No. 93- ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO CLC,
Petitioner,

v.

STEPHEN T. AGUINAGA, WAYNE PAPPAN and JANET BROWN, individually and on behalf of all others similarly situated,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The collective bargaining agreement at issue in this case contains a provision, favored by the federal labor laws, establishing a grievance-arbitration system as the exclusive method of resolving contract disputes. The question presented is:

Whether, and if so under what circumstances, employees are free to litigate a breach of contract claim directly in federal court without ever having requested their union to pursue a grievance on the claim.

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings in the Court of Appeals are named in the caption.

Additional defendants in the district court were John Morrell & Company, which was dismissed pursuant to a settlement, and Local 340, United Food and Commercial Workers, as to which the district court directed a verdict of dismissal at the close of the evidence.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner United Food and Commercial Workers International Union, AFL-CIO CLC respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 993 F.2d 1463 and is reprinted in the Appendix to this Petition ("Pet. App.") at 1a-29a. The unreported order denying petitioner's petition for rehearing and suggestion for rehearing en banc is reprinted at Pet. App. 100a-101a.

The unreported opinion of the district court denying petitioner's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial is reprinted at Pet. App. 30a-44a. The jury's verdict is reprinted at Pet. App. 45a-46a, and the judgment as to liability is reprinted at Pet. App. 47a-48a. Opinions of the district court with respect to damages are reprinted at Pet. App. 49a-76a (opinion filed July 12, 1989), Pet. App. 77a-80a (opinion filed April 16, 1990), and Pet. App. 81a-95a (opinion filed October 9, 1990). The journal entry of final judgment is reprinted at Pet. App. 96a-97a, and the final judgment is reprinted at Pet. App. 98a-99a.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1993. A timely petition for rehearing was denied on July 16, 1993 (Pet. App. at 100a-101a). On October 1, 1993, following timely application, this Court, per Circuit Justice Ginsburg, entered an order extending the time for filing a petition for certiorari to and including November 15, 1993 (Pet. App. at 102a). This petition is filed by that date. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 203(d) of the Labor Management Relations Act, 29 U.S.C. § 173(d), provides in pertinent part as follows:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.

Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in

> an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

A. Respondents, plaintiffs below, were employed by John Morrell & Co. ("Morrell" or "the Company") at Morrell's Rodeo Meats ("Rodeo") meatpacking plant in Arkansas City, Kansas. The plant was covered by a 1979 collective bargaining agreement ("the 1979 Agreement") between Morrell and petitioner United Food and Commercial Workers International Union, AFL-CIO CLC ("UFCW" or "the International Union") and the UFCW local unions at Morrell's ten plants, including UFCW Local 340, the Local Union at the Rodeo plant. Respondents were members of the UFCW and of Local 340.

In June 1982, Morrell closed the Rodeo plant. In February 1983, the Company reopened the facility under a new name, with a workforce only one quarter the size of the Rodeo workforce and at wage and benefit levels far below what had been provided under the Rodeo collective bargaining agreement.[1]

The 1979 Agreement provided in section 10 that Morrell's right "to . . . decrease the working force" could not be exercised "for the purpose of discrimination against any Employee or to avoid any of the provisions of this Agreement, or any local agreement."[2]

The 1979 Agreement also provided the exclusive method for enforcing this contractual right. The Agree-

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[1] Appendix to Appellee/Cross Appellant's [UFCW's] Brief on Appeal ("D. App.") at 650.

[2] Appendix to Petition for Certiorari ("Pet. App.") at 33a.

ment established a grievance-arbitration system for resolving claims that the Agreement had been breached. Under that system grievances could be filed by employees and by the *Local* Union. The Agreement provided too that the *Local* Union was fully authorized to take unresolved grievances to arbitration: "the executive board of Local Union 340 shall make the final decision as to whether any Union Grievance shall go to arbitration."[3] And, in common with most such labor contracts, the Agreement provided that if a grievance were taken to arbitration, the determination of the arbitrator would be the final and binding resolution of the contract dispute.[4]

It is undisputed that *no* member of the plaintiff class ever requested in any way, formally or informally, that a grievance be filed against Morrell with respect to whether Morrell's closing of the Arkansas City plant had been in breach of section 10 of the 1979 Agreement. It also is undisputed that neither the Local Union nor the International Union stated, or even suggested, to any member that such a grievance should not be filed.

Instead of filing a grievance to assert their claim that Morrell had breached section 10 of the 1979 Agreement, respondents filed suit in federal court against Morrell, the International Union and Local 340. Respondents then settled with Morrell.[5] At trial respondents advanced no

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[3] Appendix to Plaintiffs/Appellants' Brief in the court of appeals ("P. App.") at 273. Local 340 "handled [its] own arbitrations," although the Local sometimes received "International Union assistance." 5-19-88 Transcript at 45-46, D. App. at 1151-1152.

[4] P. App. at 247-248, 272-273.

[5] Respondents received in settlement a cash payment of $1,200,000, and $400,000 in coupons for Morrell meat products. District Court Document ("Doc.") 240. One-third of the total recovery ($533,300), as well as $46,607.73 in expenses, was paid to respondents' counsel pursuant to a contingency-fee arrangement. Doc. 250, D. App. at 37. As part of the settlement, Morrell released four documents that had not previously been revealed to respondents or to the UCFW;

contention—let alone any evidence—that Local 340 was anything but a perfectly faithful bargaining representative of the class members. Indeed, officers of Local 340 who had the authority to handle grievances were members of the class.[6] The district court therefore directed a verdict in favor of the Local Union at the close of the evidence at trial, a ruling which respondents did not contest.[7]

After an eight-week jury trial, followed by protracted remedial determinations, damages in excess of $4 million were assessed against the International Union solely on the ground that Morrell had breached section 10 and that the International Union had "failed to take appropriate steps to remedy Morrell's breach." [8]

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those documents proved that Morrell had devised in 1981 a secret plan to close the Rodeo plant and to reopen it later as a nonunion plant. P. App. at 404-416; D. App. at 1015-1018. One of those documents revealed that the Company's strategy was one of "*concealing* from the [UCFW] its intention [in this regard]." P. App. at 415-416 (internal Morrell memorandum) (emphasis in original).

[6] This included Booker Jennings, who was chairman of the grievance committee, and Donald McBride, the chief steward, who was responsible for "present[ing] [members'] grievances." 4-18-88 Transcript at 119, D. App. at 758. *See also* Plaintiffs Appellants' Reply Brief in the court of appeals, at 21 n. 13 (acknowledging that McBride was chief steward). In addition, several class members were on Local 340's executive board. 4-15-88 Transcript at 107-108, D. App. at 700-701.

[7] Instr. 5, Doc. 559, D. App. at 68.

[8] The district court instructed the jury that "[i]n this case, before the Union could be found liable of any alleged violation of duty of fair representation, the jury must find that Morrell breached the Master Agreement . . . ." Instr. 8, Doc. 559, D. App. at 72. The jury found that Morrell had breached section 10, *see* Pet. App. at 46a, 51a, and the court fashioned its damages award against the Union "based solely on the breach of section 10." *Id.* at 63a.

In fashioning that award, the district court declared that there was "no evidence that the Union caused or participated in Morrell's breach of the 1979 Master Agreement," *id.* at 55a, but that the UFCW had "failed to take appropriate steps to remedy Morrell's breach." *Id.* at 57a. The court held that in view of that failure

B. In the district court and in the court of appeals, the UFCW argued that respondents' claim for damages resulting from the Company's breach of contract was barred by respondents' failure to have even attempted to invoke the grievance arbitration procedure—the procedure established by the contract as the exclusive means for resolving claims of contract breach. The courts below rejected that contention.

In response to the UFCW's argument that respondents could not be excused from pursuing a grievance through the Local Union, which indisputably was a fair representative, the court of appeals stated as follows:

> Although the local unions generally had primary responsibility for enforcing the 1979 Master Agreement, the evidence supports a finding that in the case of Morrell's Section 10 breach, the [International] Union, not the Local, assumed control over the matter. Upon the reopening of [the plant], the [International] Union reassured Plaintiffs that if Morrell had violated the 1979 Master Agreement, the [International] Union, not the Local, would seek to remedy the violation. Therefore, in determining whether Plaintiffs are required to exhaust, the relevant inquiry is whether the [International] Union, not the Local, breached its duty of fair representation. [Pet. App. at 12a-13a.]

In that discussion of the International Union's role in possible proceedings against Morrell, the court below was

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the UFCW would be held liable for 25% of the damages flowing from Morrell's breach of section 10. *Id.* at 60a. The court stated that such an apportionment was "consistent with" what would result from reconstructing how the damages to the class from Morrell's breach would have been reduced had the UFCW secured an arbitration award remedying that breach. *Id.* *See also id.* at 23a.

On appeal the Tenth Circuit affirmed the holding that the UFCW should be held liable for 25% of the damages flowing from Morrell's breach of section 10, but the court of appeals directed the district court to redetermine certain aspects of those damages. *Id.* at 15a-17a, 27a-28a.

referring to a letter sent by an International Union representative to the Secretary-Treasurer of Local 340 in February 1983, shortly after Morrell had reopened operations in Arkansas City, which stated, in its entirety, as follows:

> This is to advise that we are investigating the reopening of the Arkansas City plant. If it is established that John Morrell & Company violated the Collective Bargaining Agreement, we will follow those provisions of the National Labor Relations Act. And, we will pursue through the National Labor Relations Board, any and all damages, as a result of such violations. [P. App. at 334.][9]

Thus, the court below was referring not to any statements made by the International Union concerning the subject of a possible grievance, but rather to a statement concerning the International Union's pursuit of an unfair labor practice charge that was entirely distinct from —and in no way preclusive of—such a grievance.

Having declared on the basis just described that "the relevant inquiry is whether the [International] Union, not the Local, breached its duty of fair representation," Pet. App. at 12a-13a, the court of appeals went on to state that "[p]laintiffs were . . . not required to exhaust" the grievance-arbitration procedure because they "successfully proved that the [International] Union breached its duty of fair representation." *Id.*

The court below declared that two UFCW actions constituted that breach: "(1) the [International] Union's withdrawal of its unfair labor practice charge, and (2) the [International] Union's entry into [two] side letters [in 1982 negotiations with Morrell]." Pet. App. at 13a. *See also id.* at 9a-10a. The court did not make clear precisely what bearing those actions had on the question

[9] The International Union proceeded to file an unfair labor practice charge in March 1983. However, the charge was withdrawn in July 1983, after Morrell agreed to a new contract covering the Arkansas City facility. *See infra* p. 8.

of plaintiffs' duty to exhaust contractual remedies. Nevertheless, because the court below attributed legal significance to these two actions of the UFCW, we proceed to summarize the facts concerning those actions.

1. Shortly after Morrell reopened operations in Arkansas City, the UFCW filed a charge with the National Labor Relations Board alleging, *inter alia*, that Morrell had violated sections 8(a)(1), (3) and (5) of the National Labor Relations Act (i) by refusing to reemploy many of the former Rodeo workers (*i.e.*, respondents), and (ii) by reducing wages and benefits without recognizing and bargaining with the UFCW.[10] Although at one point the law firm hired by the UFCW to assist in pursuing the charge reported that the NLRB Regional Office had decided to issue a formal complaint against Morrell, that Office ultimately referred the matter to the NLRB Office of Advice in Washington, D.C. for further analysis, and urged Morrell and the UFCW to attempt to resolve the dispute through negotiation.[11] In discussions both with the UFCW and with the NLRB, Morrell threatened to close the plant again if the charge were not dropped.[12] In July 1983 the UFWC was able to secure Morrell's agreement to a contract substantially increasing wages and benefits at the Arkansas City facility, and recognizing the UFCW as bargaining representative (subject to a card check demonstrating that the UFCW had majority support). Based on that agreement, the UFCW agreed to dismiss the unfair labor practice charge.[13]

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[10] P. App. at 401-403.

[11] D. App. at 340, 1100, 1040-1042.

[12] *Id.* at 1041.

[13] *Id.* at 295, 1003-1004, 1044, 1096-1099. The charge later was reinstated after the secret Morrell documents discussed *supra* note 5 had been revealed. The subsequent history of the reinstated charge is detailed in *John Morrell & Co.*, 304 NLRB 896 (1991), *review denied*, 998 F.2d 7 (D.C. Cir. 1993).

2. During the period in which the events of this case unfolded, the meatpacking industry was in crisis. Numerous companies closed at least some of their plants, and demanded significant contract concessions at the remaining plants.[14]

The 1979 Agreement covering the Rodeo plant was a "master agreement" which covered ten Morrell facilities for the period September 1, 1979 through September 1, 1982. However, by late August 1982, only three of those facilities were still open; and under the UFCW's long established practice, any new Master Agreement would cover only those open plants.[15]

The 1979 Master Agreement had contained a provision, section 101, which stated that if Morrell were to open a "new" plant in the "greater Midwest" or the "far West," as distinguished from the "Southeast, Southwest and Northeast," and if the UFCW could demonstrate that it represented a majority of the employees at the new plant, then the plant would "come under the Master Agreement." [16] In the negotiations leading up to the 1982 Master Agreement, Morrell took the position that section 101 should not be included in the new agreement, but Morrell ultimately settled for a side letter clarifying the definition of the geographic regions covered by section 101.[17] The letter stated, *inter alia*, that Arkansas City fell into the Southwest region.[18]

The General Counsel of the International Union's Packinghouse Division advised the UFCW to accept this letter

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[14] *Id.* at 859-864, 1198, 1200-1218, 1322-1326.

[15] *Id.* at 667, 764-765, 886, 913-914, 1131-1132, 1262-1264, 1276-1280, 1374-1376.

[16] P. App. at 258.

[17] D. App. at 302, 942-955, 1391-1400.

[18] P. App. at 295.

because (i) even without the letter, there was a substantial likelihood that Morrell would prevail on its contention that Arkansas City was in the "Southwest" rather than the "Midwest," as those terms had been used in the meat-packing industry;[19] (ii) if an agreement were not reached promptly, Morrell would be free to implement unilaterally its position on this issue;[20] and (iii) the strike that the UFCW had undertaken in resistance to Morrell's contract concession demands appeared to be on the verge of collapsing, with the result that the UFCW would lose all means of resisting Morrell's demands.[21]

A second side letter executed with the 1982 Master Agreement stated as follows:

> The parties agree that nothing in the Master Agreement *executed today* precludes the Company from reopening previously closed plants located at El Paso, Texas, Fort Smith, Arkansas, Arkansas City, Kansas and Memphis, Tennessee and that if such plants are reopened, no provision of *said* Master Agreement requires that such plants be subject to *said* Master Agreement.[22]

The General Counsel of the UFCW Packinghouse Division advised the UFCW to accept this letter because the letter's characterization of the terms of the 1982 Master Agreement was entirely correct.[23] In agreeing to this side letter, the UFCW rejected Morrell's demand for broader language that would have required the UFCW to waive all legal rights that might be implicated by a reopening of a closed plant.[24]

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[19] D. App. at 1399-1400; *see also id.* at 292-293, 765-766, 1114, 1397-1398.

[20] *Id.* at 1398.

[21] *Id.* at 931-932, 937-939, 1393-1394.

[22] P. App. at 296 (emphasis added).

[23] D. App. at 293, 960-962, 967-970, 1412-1416.

[24] P. App. at 329-331; D. App. at 293, 1412.

The courts below did *not* determine, and could not plausibly have determined, that either the withdrawal of the 1983 unfair labor practice charge or the entry into the 1982 side letters operated to prevent the filing and the pursuit by any employee of a grievance complaining that Morrell had breached section 10 of the 1979 Agreement.[25] Rather, the courts below concluded that these actions constituted breaches of the UFCW's duty to fairly represent the plaintiffs, and that, as such, these actions provided a basis for the further conclusion that the UFCW would have prevented the Local Union, which had committed no breach of its fair representation duty, from processing a grievance fairly had any employee requested the Local

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[25] The district court declared that "[t]he plaintiffs' rights were taken away by the execution of the side letter agreements," in that "[a]bsent the side letter agreements, when Morrell reopened the Rodeo Meats plant, the plant would have been covered by the provisions of the Master Agreement. The plaintiffs would have been eligible for rehire at Master Agreement wages." Pet. App. at 39a. The court of appeals characterized the side letters in similar terms. *Id.* at 9a-10a.

It is worthy of note in this regard that the courts below were *not* suggesting that the side letters gave up the right of employees to assert a grievance for breach of section 10 of the 1979 Master Agreement. Even as interpreted by the courts below, the side letters simply acknowledged that if Morrell were to open a "new plant," the 1982 Master Agreement contained no provision dictating that the plant automatically would come under that Master Agreement. *See supra* pp. 9-10. Even if the lower courts were correct in describing this result as a change from what would have been the case absent the side letters, this change could have had *no* effect on employees' rights to assert a grievance for breach of section 10 of the 1979 Master Agreement. Section 10 established a basis for attacking a plant *closing* (or a reduction of the workforce) if a certain *improper intent* were proved. The side letters here, which dealt with the question whether the *opening* of a plant, *without more*, would violate the *1982 Master Agreement*, did not waive claims that the *closing* of Rodeo, for a *prohibited purpose*, violated section 10 of the *1979 Master Agreement*. Indeed, the Union expressly refused to give Morrell a broad waiver that might have had such a reach. *See supra* p. 10.

to do so. However, because no employee ever requested the Local Union or the UFCW to pursue any such grievance, the question as to what the UFCW would have done in the event of a request is by nature hypothetical, as is the lower courts' answer to that question.

REASONS FOR GRANTING THE WRIT

The federal labor policy regarding claims that an employer has breached a collective bargaining agreement is a synthesis that reconciles the rights and obligations of the contracting parties—the union and the employer—and the covered employees and that allocates decision-making authority between private agreed-upon methods for the final adjustment of contract disputes and the public method for so doing—federal court breach of contract suits.

The rules as to when employees who assert that their employer has breached a labor contract are required to proceed through the contract's grievance-arbitration process and when they are entitled to bypass that process in favor of a federal court breach of contract suit are thus at the very core of the federal system for ordering the relations between labor and management during the term of a collective bargaining agreement. These rules determine both the vitality of the policy favoring private dispute settlement and the extent of the federal courts' labor contract case docket.

The most debated—and the most debatable—of these rules for determining the proper contract dispute resolution forum is the exception to the general requirement that employees must process their contract claims through the grievance-arbitration system provided for in the labor contract, that permits an employee direct entry to the federal court when it would be "futile" to process the claim through the otherwise favored contractual dispute resolution system.

The courts of appeals are in conflict on both the nature and the dimensions of this "futility" exception. And, the Tenth Circuit's delineation of the scope of exception is by far the most expansive, and by far the most threatening to the proper functioning of the grievance-arbitration process. Precisely because that is so, the decision below skews the careful balance this Court has struck between fostering the consensual private resolution of disputes under collective bargaining agreements and safeguarding individual employees' interests in having their contract claims fairly and properly resolved.

Given the disarray in the lower court law, the importance of uniformity in the rules governing the application and interpretation of collective bargaining agreements, and the incompatibility of the decision below with the most basic labor law principles, this *certiorari* petition should be granted.

1. "[F]ederal labor policy requires that individual employees wishing to assert contract grievances [in court] must *attempt* use of the contract grievance procedure agreed upon by the employer and union as the mode of redress." *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965) (emphasis by the Court). "[T]here can be no doubt that the employee must afford the union the opportunity to act on his behalf." *Id.* at 653.

The policy is stated in these terms because the norm, as here, is that the labor contract establishes an exclusive grievance-arbitration process for resolving contract disputes pursuant to which the union is given "discretion to supervise the grievance machinery and to invoke arbitration, [and] the employer and the union contemplate that each will endeavor to settle grievances short of arbitration." *Vaca v. Sipes*, 386 U.S. 171, 191 (1967). To temper the union's role, the basic exhaustion requirement is subject to an exception whereby an aggrieved employee who makes that attempt and is met by a union that then refuses, in violation of its duty of fair representation,

to process his grievance fairly in the contractual dispute resolution system is entitled to pursue his claim in court. *See Vaca*, 386 U.S. at 185; *Hines v. Anchor Motor Freight Inc.*, 424 U.S. 554 (1976).

2. The "futility" exception to the basic requirement of exhaustion of contract remedies has its roots in *Glover v. St. Louis-San Francisco R. Co.*, 393 U.S. 324 (1969). A number of the courts of appeals have read *Glover* to take the law to the point where an employee is entitled to bring a suit for breach of a labor contract in federal court without even requesting his union to process his grievance if the employee can establish that such a request would have been "futile." *See* cases discussed *infra* pp. 15-17. *Glover* arose out of a less clear-cut set of facts than that, and its precise import is far from clear. Not surprisingly, then, as we have noted, the courts of appeals are in conflict as to its meaning.

(a) In *Glover*, the plaintiffs alleged that their employer, in violation of a collective bargaining agreement, was refusing to promote them because of their race. 393 U.S. at 325. The plaintiffs further alleged that the employer's wrongful conduct was taken "in accordance with . . . a subrosa agreement between [the employer] and certain officials of the Brotherhood [the union acting as their exclusive bargaining representative]." *Id.* And, the plaintiffs specifically alleged that they had "called upon the Brotherhood to process a grievance on their behalf with the Company under the machinery provided by the Collective Bargaining Agreement," and that in response to those requests "representatives of the Brotherhood told the Negro plaintiffs time and time again: (a) that they were kidding themselves if they thought they could ever get white men's jobs; (b) that nothing would ever be done for them; and (c) that to file a formal complaint with the Brotherhood or with the Company would be a waste of their time." *Id.* at 326-327.

The Court held that those facts presented "the situation where the effort to proceed formally with contractual

or administrative remedies would be wholly futile," and that such a situation constitutes an "exception[] to the exhaustion requirement." 393 U.S. at 330. The Court explained:

> Here the complaint alleges in the clearest possible terms that a formal effort to pursue contractual or administrative remedies would be absolutely futile. Under these circumstances, the *attempt* to exhaust contractual remedies, required under *Maddox*, is easily satisfied by petitioners' repeated complaints to company and union officials, and no time-consuming formalities should be demanded of them. [*Id.* at 331 (emphasis by the Court).][24]

The fairest reading of the foregoing is, first, that the fact that a plaintiff has taken actions which *in substance* constitute a request to proceed on his behalf in the grievance-arbitration process satisfies the exhaustion requirement, and, second, that, where that is so, the fact that the plaintiff did not satisfy some or all of the *formalities* attendant to filing a grievance will not be held against him. And, at least this much is plain: neither in *Glover* nor since has this Court addressed the question whether the "futility" exception covers the situation in which an employee *never* has asked the union to file a grievance relating to the conduct of which he complains.

(b) The courts of appeals have sought to fill this open area in different ways.

(i) At least one court of appeals appears to proceed on the premise that the employee's complete failure to request the union to proceed with his grievance is fatal to a federal court breach of contract suit. In *Carr v. Pacific*

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[24] The Court also emphasized that the practices challenged by the plaintiffs in *Glover* had allegedly been carried out pursuant to a tacit agreement between the union and the employer. *Id.* That aspect of *Glover* is not involved in this case, where, as the district court noted, there was "no evidence that the Union caused or participated in Morrell's breach of the 1979 Master Agreement." Pet. App. at 55a.

Maritime Ass'n, 904 F.2d 1313, 1317-18 (9th Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991), the Ninth Circuit held that the plaintiff employee's failure to invoke the grievance procedure could not be excused regardless of the merit of the plaintiff's contention that the grievance panel was biased. The court held that the claim of bias should itself have been presented to the grievance panel, and the court did not even mention the possibility that such a step might be excused as futile.

(ii) Three other courts of appeals follow an approach that may fairly be characterized, in the words of the Sixth Circuit, as excusing the employee's failure to have raised his grievance with the union only upon "a clear and positive showing of futility." *Terwilliger v. Greyhound Lines, Inc.*, 882 F.2d 1033, 1039 (6th Cir. 1989) (quoting *Miller v. Chrysler Corp.*, 748 F.2d 323, 326 (6th Cir. 1984)), *cert. denied*, 495 U.S. 946 (1990). Most to the point here, there are numerous cases in the Third, Sixth and Seventh Circuits in which the failure to have requested the union to process a grievance was held *not* to be excusable despite a claim of futility substantially stronger than is presented here.

In *Hendricks v. Edgewater Steel Co.*, 898 F.2d 385, 388-89 (3d Cir. 1990), for example, the employee's failure to file a grievance was *not* excused even though the union's grievance officer had told the employee to "forget about" the matter in question. In *Roman v. United States Postal Service*, 821 F.2d 382, 389-90 (7th Cir. 1987) the Seventh Circuit held that an employee's failure to have filed a grievance at the first step of the grievance procedure could not be excused even though union officials who would be responsible for handling the grievance at the later steps had advised the employee that the grievance was invalid. And, in *Durham v. Mason & Dixon Lines, Inc.*, 404 F.2d 864 (6th Cir. 1968), *cert. denied*, 394 U.S. 998 (1969), the court held that the plaintiff employee could not be excused for having failed to file a grievance asserting his claim that a change in the collec-

tive bargaining agreement had been procured through fraudulent misrepresentations by the employer, even though the joint union-employer committee that would consider the grievance was the same body as had approved the change in the agreement.[27]

(iii) Thirdly, the Fourth and Fifth Circuits have described the futility exception in somewhat broader terms than the Third, Sixth and Seventh Circuits, and in far broader terms than the Ninth Circuit, albeit still finding the exception *not* to be applicable on the facts presented. *See, e.g., Amburgey v. Consolidation Coal Co.*, 923 F.2d 27 (4th Cir. 1991);[28] *Rabalais v. Dresser Indus., Inc.*, 566 F.2d 518 (5th Cir. 1978).[29]

* * * *

No other circuit has gone as far as the court below in terms of the circumstances in which the complete failure to request the union to proceed with a grievance may be excused as futile.

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[27] *See also Miller v. Chrysler Corp., supra*, 748 F.2d at 326 & n.1 (evidence that one union officer or body was hostile to plaintiff does not establish that resort to the grievance procedure would have been futile, where other officers or bodies also would have had a role in the procedure).

[28] The *Amburgey* Court stated:

> An employee does not make his task any easier by not at least attempting to exhaust his contractual remedies. Certainly, where the employee has actual union performance during the grievance process as evidence, he can better show how it was "grossly deficient." A plaintiff like Amburgey must show that, because of the union's breach of its duty of fair representation, resort to contractual remedies would have been futile. [923 F.2d at 29 (footnote omitted)].

[29] The *Rabalais* Court stated:

> No exhaustion is necessary if . . . exhaustion of contractual remedies would be futile because the aggrieved employee would have to submit his claim to a group "which is in large part chosen by the [employer and union] against whom [his] real complaint is made." [566 F.2d at 519 (quoting *Glover*, 393 U.S. at 330)].

3. Every relevant consideration militates against the radical expansion of the "futility" exception beyond situations in which the employee has in substance but not in every formal term met the exhaustion requirement: *viz.*, has "*attempt*[*ed*] use of the contract grievance procedure agreed upon by the employer and union as the mode of redress." *Maddox*, 379 U.S. at 652.

First of all, it costs an employee virtually no time, effort or expense to initiate the grievance process. A simple request to an appropriate union official that a grievance be filed is generally sufficient to set the process in motion. And, that simple act is of great consequence in that it affords the private system an opportunity to address the dispute.

Second, where, despite the employee's fears, the union does take up the grievance the employee presents, does so in good faith, and prevails, it is self-evident that both the individual employee's interests and the public interests stated in the labor policy are fully vindicated. The same is true if the union pursues the grievance in good faith and in the end the grievance is found to be without merit. No dispute resolution system public or private guarantees every claimant a judgment in his favor in every case and without regard to the facts and the law.

Third, if the employee presents his grievance to the union and the union refuses to act or acts in a manner that breaches the duty of fair representation, the employee suffers one real but relatively modest cost: a delay in pursuing a direct suit in court. But, even putting aside the point that there is no reason to believe that this will happen in a majority of cases, that cost, we submit, is more than outweighed by the resulting gains in simplifying the federal court case and in increasing our confidence in the accuracy of the results. In such a case there are concrete historical facts as to what the union did or did not do in responding to the grievance. The adjudicative task is to determine whether those concrete facts, and the

inferences to be drawn from those facts, establish a breach of the union's duty.[30] In contrast, under the Tenth Circuit's "futility" approach, the district court, or a jury, must hypothesize, from disputed facts as to matters at several removes, what the union would have done—and why the union would have done so—had the plaintiff sought to initiate a grievance. That, of course, is a far more complex and far more uncertain endeavor than judging the adequacy of an actual union response to a grievance actually presented.

Ultimately, what is at stake here is the integrity of the federal labor law rules for allocating decision making authority over contract claims between contractual dispute settlement processes and the federal courts. These rules cut deeply against according a claimant his choice of a forum based on his assessment of which of his choices maximizes his likelihood of success and his potential recovery if he succeeds.

A collective bargaining agreement's substantive provisions and its grievance-arbitration provisions are inextricably intertwined. The parties do not simply agree on the general rules to govern the workplace; they agree on such rules to be interpreted and enforced though a single informal, inexpensive and expeditious dispute settlement process that is under their joint control and that provides for final decisions rendered by an impartial expert decision-maker knowledgeable in the law of the shop. *See Bowen v. United States Postal Serv.*, 459 U.S. 212, 226-227 (1983) (employer has right to rely on grievance-arbitration process as the "uniform exclusive method" for settlement of contract disputes); *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 580-582 (1960) (parties entrust interpretation and application of the collective bargaining agreement to a labor arbitrator "chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring

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[30] *See supra* pp. 13-14.

to bear considerations which are not expressed in the contract as criteria for judgment"); *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 41 (1987) (reliance on arbitral expertise is especially crucial "when it comes to formulating remedies"). Permitting an employee to entirely bypass the grievance-arbitration system works an unwarranted sacrifice of all of those values and by so doing changes the bargain the parties have struck through free collective bargaining. That result would fly in the face of "[t]he unmistakable policy of Congress stated in § 203(d) [of the Labor Management Relations Act], 29 U.S.C. § 173(d). . . .: 'Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.' " *Buffalo Forge Co. v. Steelworkers*, 428 U.S. 397, 411-12 (1976) (quoting *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 377 (1974)).

As Justice Harlan explained in the opinion for the Court in *Maddox*, 379 U.S. at 653:

> A . . . rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 103 [(1962)].

The adverse consequences for the public contract dispute resolution system—the federal courts—are just as real and present. As Judge Easterbrook writing for the Seventh Circuit has stated:

> A depressingly large number of recent cases grows out of refusals to use or abide by the grievance-arbitration machinery of collective-bargaining agreements. . . . Those who refuse to invoke the process or abide by the awards endanger the productivity of the workplace and divert judicial time from the disputes that courts are supposed to resolve. [*Bailey v. Bicknell Minerals, Inc.*, 819 F.2d 690, 691 (7th Cir. 1987) (citations omitted).]

In sum, the time is now ripe for this Court to resolve definitively whether direct actions in federal court are to be allowed where there was never even an attempt to invoke the contractual grievance-arbitration process, and, if so, the circumstances that permit such evasion of contractual dispute resolution systems. This petition for certiorari should be granted for that purpose.

CONCLUSION

For the foregoing reasons, this Court should grant the instant petition for certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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93-769

No. 93- ——

FILED
NOV 1 5 1993

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO CLC,
Petitioner,

v.

STEPHEN T. AGUINAGA, WAYNE PAPPAN and JANET BROWN, individually and on behalf of all others similarly situated,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 92-3091, 92-3093

STEPHEN T. AGUINAGA; WAYNE PAPPAN; JANET BROWN, Individually and in behalf of all union members similarly situated,

Plaintiffs-Appellants,

v.

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION; UNITED FOOD AND COMMERCIAL WORKERS,

Defendants-Appellees.

May 19, 1993

Ken M. Peterson, Morris, Laing, Evans, Brock & Kennedy, Chartered, Wichita, KS (Robert W. Coykendall, Morris, Laing, Evans, Brock & Kennedy, Chartered, Robert C. Brown, Patricia M. Dengler, Smith, Shay, Farmer & Wetta, with him on the brief), for plaintiffs-appellants.

Laurence Gold, AFL-CIO Legal Dept., Washington, DC (Harry Huge, Steven K. Hoffman, Annette M. Capretta, Donovan Leisure, Rogovin, Huge & Schiller, Richard Roesel, United Food & Commercial Workers Intern. Union, with him on the brief), for defendants-appellees.

Before TACHA, McWILLIAMS, and BALDOCK, Circuit Judges.

BALDOCK, Circuit Judge.

This appeal arises from a hybrid breach of contract/unfair representation class action brought by 641 union members ("Plaintiffs") against their employer, John Morrell & Company ("Morrell"), the United Food and Commercial Workers International Union ("the Union"), and the Local Union 340, United Food and Commercial Workers ("the Local"), under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. Plaintiffs alleged that Morrell breached several provisions of the 1979 collective bargaining agreement ("1979 Master Agreement") and that the Union and the Local breached their duty of fair representation in their response to Morrell's breaches. Morrell settled with Plaintiffs prior to trial and the Local was dismissed during the course of trial. The issue of the Union's liability was tried to a jury, and the jury returned a verdict in favor of Plaintiffs, finding that the Union breached its duty of fair representation. By agreement of the parties, the issue of damages was submitted to the court. After nearly two and one-half years, the court, based on the parties' briefs, entered final judgment against the Union, finding it liable to Plaintiffs in the amount of $4,730,869. Plaintiffs and the Union raise various issues on appeal, and we have jurisdiction pursuant to 28 U.S.C. § 1291.

I.

Plaintiffs are a class of former employees at an Arkansas City, Kansas meat packing plant operated by Morrell, that produced "Rodeo" brand meats ("the Rodeo Plant"). During their course of employment at the Rodeo Plant, Plaintiffs were members of the Union and the Local. As was common in the industry, the Union and Morrell negotiated a "Master Agreement" in 1979, to control the rights and obligations of employees at all Morrell facilities, including the Rodeo Plant. The 1979 Master Agreement was in effect until September 1, 1982

and from year to year thereafter unless proper notice was given.

Three provisions of the 1979 Master Agreement are at issue here. Section 10 of the 1979 Master Agreement prohibited Morrell from decreasing the work force for the purpose of avoiding any of the provisions of the 1979 Master Agreement. Section 100 placed restrictions on Morrell following the closing of a plant. Under Section 100, Morrell was prohibited from contracting with other plants located within one hundred miles of a closed plant to provide services formerly provided by a closed plant. This restriction would remain in effect during a five-year period following a plant closing. Section 101 provided the conditions under which a new company plant would be brought under the provisions of a Master Agreement in effect at the time of the plant opening. Section 101 only applied to plants opened in the "greater Midwest" and the "far West" regions of the country.

In May 1981, Morrell began issuing notices of closing to certain of its meat packing plants covered by the 1979 Master Agreement. Morrell represented these closings to be permanent. In December 1981, the Rodeo Plant became the fifth Morrell plant to receive a closing notice, with the effective date of closure scheduled for June 1982. By Spring 1982, Morrell had either closed or issued closing notices to seven of its ten plants.

In May 1982, as expiration of the initial term of the 1979 Master Agreement approached, the Union and Morrell met to begin new Master Agreement negotiations. In an effort to avoid the closure of several plants, the Union offered Morrell a concessionary package. Under the package, the Union offered, among other concessions, a three year wage freeze and suspension of all cost-of-living payments for the life of a new agreement. Morrell, however, rejected the Union's offer, and instead proposed changes in the Master Agreement whereby individual plants would

be subject to separate wage and benefits packages. For the Rodeo Plant, Morrell proposed a forty percent cut in wages as well as cuts in benefits. The Rodeo Plant employees followed the Union's strong recommendations against the offer and voted to reject it.

As the time for the Rodeo Plant closing drew near, the Union, suspecting that Morrell might attempt direct negotiations with the Rodeo Plant Local, ordered the Local executive officer not to discuss any provisions of the Master Agreement with Morrell. Instead, the Union met again with Morrell officials in June 1982. However, nothing was achieved at that meeting and the Rodeo Plant was closed as scheduled on June 19, 1982. Pursuant to the 1979 Master Agreement, Plaintiffs received severance benefits upon closure of the plant.

In July 1982, negotiations between Morrell and the Union resumed. In August, Morrell offered what it termed a "final offer of settlement" which included the elimination of Sections 100 and 101 of the Master Agreement. The Union rejected the offer and Union representatives voted to authorize a strike at Morrell's Sioux Falls plant. Intervening negotiations failed, and, on September 1, 1982, the Sioux Falls workers went out on strike. Two days later, the Union distributed a handbill to the Sioux Falls workers that stated, "[o]n August 31st it became clear to us that Morrell wants [Sections] 100 and 101 eliminated because they intend to start operations at some or all of the closed plants." Appellant App. at 283.

Negotiations reconvened on September 7, 1982. On September 10, 1982, the parties signed a new Master Agreement, ending the Sioux Falls strike. In reaching agreement with Morrell, the Union entered into two secret side letter agreements. These side letter agreements, entered into on September 9, 1982 and September 10, 1982, affected the interpretation of Section 101 in the new Master Agreement. The September 9, 1982 letter

provided that the plant located in Arkansas City, Kansas (the Rodeo Plant) "shall be included in the Southeast." Appellant App. at 295. The September 10, 1982 side letter specifically provided that "nothing in the Master Agreement executed today precludes [Morrell] from reopening previously closed plants located at . . . Arkansas City, Kansas . . . and that if such plants are reopened, no provision of said Master Agreement requires that such plants be subject to said Master Agreement." Appellant App. at 296. As a result of these two side letters, Morrell was allowed to reopen the Rodeo Plant as a nonunion plant without having to pay Master Agreement wages.

The Union failed to notify Plaintiffs of the existence or the content of the two side letter agreements. After hearing about the contents of the new Master Agreement from a Sioux Falls worker, the Rodeo Plant steward, a class member, contacted Union official John Mancuso. The steward asked Mancuso whether the Union agreed to let Morrell open the Rodeo Plant back up again. Mancuso's notes from the conversation state, "[t]his guy (the Rodeo Plant steward) kept asking if we (the Union) agreed with the company to let them reopen and I kept telling him we didn't." Appellant App. at 317.

In March 1983, Morrell reopened the Rodeo Plant facility as the Ark City Packing Company ("ACPC"). The Union notified Plaintiffs that "if it is established that [Morrell] violated the [Master Agreement], . . . we will pursue through the National Labor Relations Board [("NLRB")], any and all damages as a result of such violations." Appellant App. at 334. On March 29, 1983, the Union filed an unfair labor practice charge with the NLRB. The Union charged Morrell with failing to recognize the Union, failing to recall Union employees, and unilaterally changing the terms and conditions of employment upon reopening of the plant. However, in exchange for Morrell's agreeing to let the Union represent the workers of the reopened ACPC plant (formerly Rodeo Plant),

the Union withdrew the unfair labor practice charge. The NLRB approved withdrawal of the charge in September 1983, and Plaintiffs instituted the present action in the same month.

After an eight-week trial on the issue of liability, the jury found that Morrell breached Section 10 and Section 100 of the 1979 Master Agreement.[1] The jury also found that the Union acted arbitrarily, discriminatively, or in bad faith by failing to protect Plaintiffs' rights with respect to Morrell's breaches. Furthermore, the jury concluded that Plaintiffs' claims against the Union were timely filed, and, with regard to Morrell's breach of Section 10 of the 1979 Master Agreement, the jury concluded that Plaintiffs were excused from exhausting their remedies. The Union filed a motion for judgement notwithstanding the verdict ("JNOV"), or in the alternative, for a new trial. The court denied the motions.

The issue of damages was determined by the court. Following extensive briefing by the parties, the court determined that damages were to be assessed based on apportionment rather than joint and several liability. 720 F.Supp. 862. The court then apportioned damages based on proportionate fault. The court concluded that the Union was liable for twenty-five percent of Plaintiffs damages, and entered judgment against the Union in the amount of $4,730,869.

On appeal, Plaintiffs claim the district court erred in its calculation of damages. The Union cross appeals,

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[1] A hybrid action under § 301 of the LMRA involves two claims: (1) that the employer breached the collective bargaining agreement, and (2) that the union breached its duty of fair representation. *Delcostello v. International Bhd. of Teamsters*, 462 U.S. 151, 163-65, 103 S.Ct. 2281, 2290-91, 76 L.Ed.2d 476 (1983). The plaintiff must prove both breaches in order to prevail. *Id.* Therefore, although Morrell had already settled with Plaintiffs prior to trial, Plaintiffs were still required to prove that Morrell breached the 1979 Master Agreement in order to prevail against the Union.

claiming the court erred in denying its post-trial motions, and raising evidentiary issues relating to the court's damage award.

II.

The Union appeals the district court's denial of its motion for JNOV, or in the alternative, for a new trial. The Union argues that the court erred in denying its post-trial motions with respect to Plaintiffs' claim that the Union breached its duty of fair representation regarding Morrell's breach of Section 10 of the 1979 Master Agreement. Specifically, the Union claims that: (1) the Union's conduct did not amount to a breach of duty, (2) Plaintiffs' failure to exhaust their contractual remedies was not excused, and (3) Plaintiffs' Section 10-related breach of duty claim against the Union was barred by the applicable statute of limitations.

In reviewing the denial of a motion for JNOV, we apply the same standard employed by the district court. *Rajala v. Allied Corp.*, 919 F.2d 610, 615 (10th Cir. 1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 1685, 114 L.Ed.2d 80 (1991). Under this standard, we review for "whether there is evidence upon which the jury could properly find a verdict for the party [against whom the motion is directed]." *Id.* (citing *Hurd v. American Hoist & Derrick Co.*, 734 F.2d 495, 498-99 (10th Cir.1984) (citation omitted)). In making this determination we view the evidence and inferences in the light most favorable to the nonmoving party. *Id.* A motion for JNOV is properly granted "only if the evidence points but one way and is susceptible to no reasonable inference which may support the opposing party's position." *O.E.R., Inc. v. Hickerson*, 880 F.2d 1178, 1180 (10th Cir.1989). We review the district court's denial of a motion for new trial for manifest abuse of discretion. *Mason v. Texaco, Inc.*, 948 F.2d 1546, 1555 (10th Cir.1991), *cert. denied*, —— U.S. ——, 112 S.Ct. 1941, 118 L.Ed.2d 547 (1992).

A.

We first address Plaintiffs' contention that the Union has waived its arguments on appeal because it failed to seek a directed verdict on the same grounds. Only those questions which have been raised in a prior motion for directed verdict may be pursued in a motion for JNOV. *Whalen v. Unit Rig, Inc.*, 794 F.2d 1248, 1251 (10th Cir.1992), *cert. denied*, —— U.S. ——, 113 S.Ct. 1417, 122 L.Ed.2d 787 (1993). However, we liberally construe motions for directed verdict, and do not require technical precision as long as the trial court is aware of the movant's position. *Anderson v. United Telephone Co.*, 933 F.2d 1500, 1504 (10th Cir.), *cert. denied*, —— U.S. ——, 112 S.Ct. 375, 116 L.Ed.2d 327 (1991).

In its motion for directed verdict, the Union argued that there was insufficient evidence to sustain a jury finding that the Union breached its duty of fair representation by entering into the 1982 side letters, or by withdrawing its unfair labor practice charge. In its motion for JNOV, the Union raised the same argument it raises here—*i.e.*, that there was insufficient evidence to uphold the jury's verdict regarding a Section 10-related breach by the Union. Although Plaintiffs argue that the issues raised by the Union in its JNOV motion and on appeal are distinct from those issues raised by the Union in its motion for directed verdict, we hold that they are inextricably intertwined. Indeed, under Plaintiffs' theory of the case, the Union's Section 10-related breach of duty arose from the Union's entry into the two side letters and the Union's withdrawal of its unfair labor practice charge. Further, we are persuaded that the Union's motion for directed verdict put the court on sufficient notice that the Union was challenging Plaintiffs' Section 10-related breach of duty claim. In fact, upon the Union's motion for JNOV, the court below addressed the Union's challenges to Plaintiffs' Section 10-related breach of duty claim. Had the court deemed the Union's claims to be new issues not previously raised on

directed verdict, the learned trial judge would not have addressed them.

B.

The Union claims that there was insufficient evidence from which the jury could have concluded that the Union breached its duty of fair representation with respect to Morrell's breach of Section 10 of the 1979 Master Agreement. A union breaches its duty of fair representation if its conduct toward a member is "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190, 87 S.Ct. 903, 916, 17 L.Ed.2d 842 (1967). A union's actions are arbitrary only if, "in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational." *Air Line Pilots Ass'n Int'l v. O'Neill*, 499 U.S. 65, ——, 111 S.Ct. 1127, 1130, 113 L.Ed.2d 51 (1991) (citation omitted). A union's discriminatory conduct violates its duty of fair representation if it is "invidious." *Id.* ——, 111 S.Ct. at 1137. Bad faith requires a showing of fraud, or deceitful or dishonest action. *Mock v. T.G. & Y. Stores Co.*, 971 F.2d 522, 531 (10th Cir.1992). The question, which the jury answered affirmatively here, was "did the Union act arbitrarily, discriminatively, *or* in bad faith with respect to Morrell's breach of Section 10 of the 1979 Master Agreement?" Appellee App. at 57 (emphasis added). Therefore, if the evidence supports a finding that the Union acted in any one of these three ways, the jury's verdict must be upheld. *See Rajala*, 919 F.2d at 615.

Viewed in the light most favorable to Plaintiffs, the evidence shows that, in August 1982, the Union knew of Morrell's plan to reopen the Rodeo Plant as a nonunion plant. Morrell's plan constituted a breach of Section 10 of the 1979 Master Agreement, yet the Union took no steps to remedy the breach. Instead, the Union entered into the two side letters with Morrell releasing all rights and claims

Plaintiffs would have had against Morrell when the plant reopened. The Union then deceived Plaintiffs by concealing the side letters. As a result, Plaintiffs did not know that their rights had been sacrificed. Lastly, in an effort to conceal its acquiescence in Morrell's breach of Section 10, the Union filed an unfair labor practice charge against Morrell. However, after the NLRB decided to issue a complaint, the Union withdrew the charge and kept the withdrawal secret.

The Union's actions in sacrificing Plaintiffs' rights to recourse against Morrell for Morrell's breach of Section 10, and the Union's efforts to conceal its actions from Plaintiffs, support the jury's verdict against the Union. First, unlike *O'Neill*, this is not a case where union members are suing their union for its failure to strike a better deal through collective bargaining. *See O'Neill*, 499 U.S. at ——, 111 S.Ct. at 1130-32. Rather, this case involves the primary concern that the duty of fair representation was designed to address—*i.e.*, the concern that individual employees not be deprived of all effective means of protecting their own interests. *Delcostello v. International Bhd. of Teamsters*, 462 U.S. 151, 164 n. 14, 103 S.Ct. 2281, 2291 n. 14, 76 L.Ed.2d 476 (1983). Here, the Union not only failed to protect Plaintiffs' interests, it bartered away Plaintiffs' means of protecting themselves and left Plaintiffs without representation. Such deliberate abandonment of Plaintiffs' interests constitutes wrongdoing on the part of the Union, *see Bennett v. Local Union No. 66*, 958 F.2d 1429, 1437-38 (7th Cir.1992), and the record contains sufficient evidence to find that this activity was irrational in light of the surrounding climate. Further, the Union's attempts to conceal its activities from Plaintiffs support a finding of bad faith on the part of the Union. *O'Neill v. ALPA*, 939 F.2d 1199, 1202-03 (5th Cir.1991) (bad faith shown by evidence of intentionally misleading or egregious misstatements by union).

Moreover, if, as the Union argues, *O'Neill* counsels that the Union be accorded due deference in its decision

to sacrifice Plaintiffs' rights, such deference would only be appropriate insofar as the Union's motive had been proper —*i.e.*, to gain advantage with Morrell in bargaining over other Morrell plants. *See* 499 U.S. at ——, 111 S.Ct. at 1135 (examination of union's performance must be highly deferential recognizing wide latitude negotiators need to perform bargaining responsibilities). Here, however, Plaintiffs presented evidence that the Union had other motives in sacrificing Plaintiffs' rights and concealing its activities. The record contains evidence that tended to show that the Union was motivated in part by its desire to obtain status as the bargaining representative for the reopened ACPC plant (formerly Rodeo Plant) employees at the expense of the former Rodeo Plant employees, or because of Union dislike of Local officials. As neither of these motives are proper for a union which has a duty to its members "akin to the duty owed by other fiduciaries to their beneficiaries," *id.* at ——, 111 S.Ct. at 1134, we hold that there is evidence upon which the jury could properly find that the Union breached its duty of fair representation. *See Ooley v. Schwitzer Div., Household Mfg. Inc.*, 961 F.2d 1293, 1303 (7th Cir.) (breach of duty for union to sacrifice individual's rights to protect itself), *cert. denied*, —— U.S. ——, 113 S.Ct. 208, 121 L.Ed.2d 148 (1992); *Bennett*, 958 F.2d at 1436-39 (union may not trade away individual's rights based on internal union politics); *Shatto v. Evans Products Co.*, 728 F.2d 1224, 1227 (9th Cir.1984) (union prohibited from trading away individual's vested contractual rights without individual's consent); *Harrison v. United Transportation Union*, 530 F.2d 558 (4th Cir.1975) (union prohibited from sacrificing individual's grievance rights to further union's own institutional interests), *cert. denied*, 425 U.S. 958, 96 S.Ct. 1739, 48 L.Ed.2d 203 (1976).

C.

The Union claims that there was insufficient evidence whereby the jury could have concluded that Plaintiffs were excused from exhausting their contractual remedies. The Union claims that because there was no evidence that the Local breached its duty of fair representation, Plaintiffs were not excused from pursuing a grievance through the Local.

An employee can bring suit under § 301 of the LMRA only if he or she has exhausted the contractual remedies provided in the collective bargaining agreements. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 563, 96 S.Ct. 1048, 1055, 47 L.Ed.2d 231 (1976). However, where the right to invoke the advanced stages of the contractual remedy process rests with the union, proof that the union breached its duty of fair representation in its response to an employer's contract breach is an exception to the requirement of exhaustion. *See Vaca*, 386 U.S. at 185-86, 87 S.Ct. at 914-15; *United Food & Commercial Workers Local 7R v. Safeway Stores, Inc.*, 889 F.2d 940, 945 (10th Cir.1989). In such instance, the union has effectively ceased to function as the employee's representative. *United Food & Commercial Workers*, 889 F.2d at 945.

Under the 1979 Master Agreement, an individual employee could initiate the grievance procedure, but the later stages of the grievance process required union participation. Although the local unions generally had primary responsibility for enforcing the 1979 Master Agreement, the evidence supports a finding that in the case of Morrell's Section 10 breach, the Union, not the Local, assumed control over the matter. Upon the reopening of ACPC, the Union reassured Plaintiffs that if Morrell had violated the 1979 Master Agreement, the Union, not the Local, would seek to remedy the violation. Therefore, in determining whether Plaintiffs are required to exhaust, the

relevant inquiry is whether the Union, not the Local, breached its duty of fair representation. As set out *supra* part II.B, Plaintiffs successfully proved that the Union breached its duty of fair representation by refusing to protect Plaintiffs' interests in the face of Morrell's Section 10 breach. Plaintiffs were therefore not required to exhaust; accordingly, the jury's finding that Plaintiffs' failure to exhaust was excused is reasonable.

D.

The Union claims that the jury lacked sufficient evidence to conclude that Plaintiffs' Section 10-related breach of duty claim against the Union was not barred by the applicable statute of limitations. The Union argues that certain members of the Plaintiff class were aware of the Union's acts constituting the Union's breach of duty in September 1982, and Plaintiffs' action is therefore barred because it was not commenced within six months.

Hybrid suits under § 301 of the LMRA are subject to the six-month statute of limitations prescribed by 29 U.S.C. § 160(b). *Delcostello*, 462 U.S. at 154-55, 103 S.Ct. at 2285-86. A hybrid suit is untimely if the plaintiff knew or should have known of the acts constituting the union's alleged violation more than six months before the action was commenced. *Lucas v. Mountain States Tel & Tel.*, 909 F.2d 419, 421-22 (10th Cir.1990). Whether an action is timely is a question for the jury to decide applying a preponderance of the evidence standard. *State of Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 651 F.2d 687, 695 (10th Cir.), *cert. denied*, 454 U.S. 895, 102 S.Ct. 392, 70 L.Ed.2d 209 (1981).

The Union's Section 10-related breach of duty of fair representation arose from two activities on the part of the Union: (1) the Union's withdrawal of its unfair labor practice charge, and (2) the Union's entry into the September 9 and 10, 1982 side letters. *See supra* part II.A.

There is no question that Plaintiffs instituted this action well within six months of learning of the Union's decision to withdraw its unfair labor practice charge. The earliest possible date that Plaintiffs knew or should have known of the Union's request to withdraw the charge was June 1983 when the Union announced its plan to request withdrawal to the ACPC employees, and Plaintiffs filed this action in September 1983. The only issue, then, is whether Plaintiffs knew or should have known of the Union's entry into the side letters more than six months prior to commencing suit.

Viewing the evidence in the light most favorable to Plaintiffs, *see Rajala*, 919 F.2d at 615, the jury properly determined that Plaintiffs' suit was timely. The Union kept the side letters, which allowed Morrell to reopen the Rodeo Plant free from the 1979 Master Agreement, secret from Plaintiffs. The Union now argues that the Rodeo Plant steward, a class member, learned of the substance of the side letters in September 1982. However, the evidence shows that the steward contacted Union official Manusco about his suspicions concerning the secret side letters and was reassured by Manusco that the Union had not, in fact, agreed to allow Morrell to reopen the Rodeo Plant. Then, upon Morrell's reopening of the plant, the Union reassured Plaintiffs that it would investigate whether Morrell had violated the Master Agreement by reopening the plant, and, in March 1983, the Union filed an unfair labor practice charge with the NLRB. These actions by the Union lulled Plaintiffs into believing that the Union was protecting their rights. *See, e.g., Rucker v. St. Louis Southwestern Ry. Co.*, 917 F.2d 1233, 1238 (10th Cir. 1990). As a result, the jury could have reasonably concluded that Plaintiffs did not know, nor should have known, of the Union's violation of their rights prior to the Union's sealing of Plaintiffs' fate by withdrawing its unfair labor practice charge in July 1983.

In sum, we conclude that the district court did not err in denying the Union's motion for JNOV. We further conclude that the court did not abuse its discretion in denying the Union's alternative motion for new trial.

III.

The Union and Plaintiffs present issues on appeal relating to the damages phase of the trial below. The Union claims that the district court erred by refusing the Union's request to present evidence demonstrating: (1) that Morrell would have decreased the Rodeo Plant work force even if no breaches had occurred, and (2) that Plaintiffs failed to mitigate damages. Plaintiffs claim the district court committed errors relating to the calculation of damages. Specifically, Plaintiffs claim that the court erred by: (1) failing to impose joint and several liability, (2) arbitrarily apportioning damages on a proportionate fault basis, and (3) limiting the period of damages to fifteen months.

A.

The damages issue was submitted to the court, and the court entered judgment on the briefs. The Union sought to introduce evidence that, even in the absence of any breaches by Morrell or the Union, Morrell would have eventually reduced the Rodeo Plant work force. The Union sought to use such evidence to establish that not all members of Plaintiff class—*i.e.*, no more than three hundred Rodeo employees—are entitled to back pay and benefits for the entire damages period. Initially, the court ruled that the Union would be permitted to introduce such evidence; however, the court later reversed itself finding that the issue of whether Morrell would have reduced the Rodeo Plant work force for economic reasons had already been presented to and rejected by the jury. We review the district court's exclusion of evidence for an abuse of discretion. *Thweatt v. Ontko*, 814 F.2d 1466, 1470 (10th Cir.1987).

The purpose of a back pay award is to make the employees whole—*i.e.*, restore the economic status quo that would have obtained but for the wrongdoing on the part of the employer and the union. *See Bowen v. United States Postal Serv.*, 459 U.S. 212, 222-23, 103 S.Ct. 588, 594-95, 74 L.Ed.2d 402 (1983); *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263, 90 S.Ct. 417, 420, 24 L.Ed.2d 405 (1969). It is improper, however, to award back pay if it can be shown that the employees would have lost their jobs at a later date even if they had been treated fairly. *NLRB v. Master Slack and or Master Trousers*, 773 F.2d 77, 83 (6th Cir.1985). The burden is on the defendant to prove by a preponderance of the evidence that an employee would have been discharged or laid off at a later date, or that the employee's job would have been phased out, even if no breach of contract and breach of duty of fair representation had occurred. *see id.*; *NLRB v. C.R. Adams Trucking, Inc.*, 767 F.2d 1276, 1277 (8th Cir.1985); *M.S.P. Indus., Inc. v. NLRB*, 568 F.2d 166, 180 (10th Cir.1977), and the defendant has a right to present such evidence in defending a claim for damages. *M.S.P. Indus.*, 568 F.2d at 180. However, the defendant does not have a right to relitigate, at the damages phase, an issue he or she has already litigated and lost at the liability phase. *See Monfort, Inc. v. NLRB*, 965 F.2d 1538, 1546-47 (10th Cir.1992) (no relitigation of issue at compliance phase of NLRB hearing (when back pay determinations made) where issue already litigated and lost at proceeding on the merits).

After a careful review of the record, we hold that the district court abused its discretion in refusing to allow the Union to present evidence that Morrell would have decreased the Rodeo work force even in the absence of breaches by Morrell and the Union. The only arguably related evidence presented by the Union at the liability phase of the trial was generalized information regarding the state of the meat packing industry in the late 1970's

and early 1980's. The Union introduced this evidence solely to try to establish that it was reasonable for the Union to believe that Morrell's closing of the Rodeo Plant was permanent. The Union introduced no evidence at all that Morrell would have, absent any breaches, eventually discharged or laid off employees, or phased out jobs at the Rodeo Plant. Therefore, the district court erred in its determination that the issue had already been litigated and decided by the jury. Because the court's error deprived the Union of an opportunity to present any evidence on an issue it was entitled to raise and on which it had the burden of proof, the court has abused its discretion. *See Monroe Div., Litton Business Sys., Inc. v. De Bari*, 562 F.2d 30, 33 (10th Cir.1977) (due process violated where defendant denied opportunity to present damages evidence). Accordingly, we remand to the district court with instructions to allow the Union the opportunity to present its evidence that Morrell would have, absent any breaches, decreased its Rodeo Plant work force to no more than three hundred employees.

B.

The Union contends that the district court erred by not allowing it to interview each class member concerning his or her individual mitigation efforts. We review for abuse of discretion. *See Thweatt*, 814 F.2d at 1470.

Employees claiming entitlement to back pay and benefits are required to make reasonable efforts to mitigate damages. *EEOC v. Sandia Corp.*, 639 F.2d 600, 627 (10th Cir.1980). Once back pay and benefits have been awarded, the burden is on the employer to show that the claimant did not exercise reasonable diligence in mitigating his or her damages. *Id.* To satisfy this burden, the employer must establish that: (1) there were suitable positions which the claimants could have discovered and for which they were qualified, and (2) the claimants failed

to use reasonable diligence in seeking such positions. *Id.* (citation omitted).

In order to satisfy its burden, the Union was required to satisfy *both* prongs of the above two-part test. The Union failed its burden of establishing the first prong—*i.e.*, that suitable positions were available for any of the Plaintiffs. Because it failed this prong of its burden, the Union has failed its burden of proof and evidence that supports the second prong of the test—*i.e.*, the individual mitigation efforts of Plaintiffs—are simply irrelevant. We therefore hold that the district court did not abuse its discretion in refusing the Union's request to interview class members regarding their individual mitigation effort.

C.

Plaintiffs claim that the court erred by apportioning damages between the Union and Morrell, instead of imposing joint and several liability. Plaintiffs argue that the Union caused or participated in Morrell's breaches of the 1979 Master Agreement, justifying imposition of joint and several liabilities. We review the court's legal conclusions de novo, and the court's factual determination of the amount of damages under the clearly erroneous standard. *Chaparral Resources, Inc. v. Monsanto Co.*, 849 F.2d 1286, 1289 (10th Cir.1988).

In hybrid § 301 cases, "[t]he governing principle [] is to apportion liability between the employer and the union according to the damage cause by the fault of each." *Vaca v. Sipes*, 386 U.S. 171, 197, 87 S.Ct. 903, 920, 17 L.Ed.2d 842 (1966). "[D]amages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer." *Id.* at 197-98, 87 S.Ct. at 920-21. The general rule that damages are to be apportioned between the employer and the union and may not

apply in situations where a union affirmatively caused the employer to commit the contract breach, or where the union and the employer actively participated in the other's breach. *Id.* at 197 n. 18, 87 S.Ct. at 920 n. 18; *see also Bennett v. Local Union No. 66*, 958 F.2d 1429, 1440 (7th Cir.1992). Rather, these situations may warrant the imposition of joint and several liability. *See Bennett*, 958 F.2d at 1440; *Bowen*, 459 U.S. 212, 103 S.Ct. 588; *see also Baskin v. Hawley*, 807 F.2d 1120 (2d Cir.1986) (holding that imposition of joint and several liability was not plain error when union participated in underlying wrongs).

The district court found that, no later than December 1981, Morrell had formulated a secret scheme to close the plant, purportedly permanently, and reopen it nonunion at a later time. Once implemented, this scheme violated the 1979 Master Agreement. Morrell was the sole initiator of this plan, and there was no evidence that the Union played a role in or had knowledge of Morrell's plan until August 1982, or, at the latest, September 1982. Upon learning of Morrell's scheme, the Union breached its duty to Plaintiffs by failing to remedy Morrell's breach of the 1979 Master Agreement, and by acquiescing in Morrell's plan as evidenced by the Union's entry into the September side letter agreements.

Given these findings, the Union did not cause or participate in Morrell's contract breach. Morrell's breach—*i.e.*, the sham closing of the Rodeo Plant—was accomplished in June 1982. The Union did not learn of the breach until after the sham closing, and any wrongdoing on its part constituted a post facto failure to remedy Morrell's breach, not an inducement to or participation in that breach. The Union's conduct is similar to that of a union that fails to process a meritorious grievance in the typical hybrid § 301 suit. Because this is not the extraordinary case where the union caused the employer's breach or where the union and the employer participated

in each other's breach, the court correctly determined that joint and several liability was inappropriate, and the general rule of apportionment applies.

D.

Plaintiffs also contend that the district court arbitrarily apportioned damages between the Union and Morrell. Plaintiffs claim is two-fold: (1) that the court erred in apportioning damages based on proportionate fault, and (2) that the court's assignment of fault was arbitrary.

1.

Under *Vaca*, liability for damages in hybrid § 301 claims must be apportioned between the employer and the union "according to the damage caused by the fault of each." 386 U.S. at 197, 87 S.Ct. at 920. Applying this principle in *Bowen*, the Supreme Court held that a union can be liable for back pay and benefits because the union's fault "requires [it] to bear some responsibility for increases in the employee's damages resulting from [the union's] breach." 459 U.S. 212, 222, 103 S.Ct. 588, 595. The *Bowen* Court also let stand a lower court apportionment of back pay between the employer and the union on a strictly chronological basis. *Id.* Under the lower court's formula, the employer was liable for back pay during the six months between the wrongful discharge date and the hypothetical date upon which the plaintiff would have been reinstated had the union not breached its duty of fair representation. *Id.* at 215-17, 103 S.Ct. at 591-92. The union was held accountable for back pay from the hypothetical arbitration date until the date of the jury verdict. *Id.* Plaintiffs argue that *Bowen* mandates such a chronological method of apportionment based on the hypothetical arbitration date.

We do not agree that *Bowen* requires that damages be apportioned based on chronology using the hypothetical arbitration date. First, the *Bowen* Court narrowly framed

the issue as "whether a union may be held primarily liable for that part of a wrongfully discharged employee's damages caused by his union's breach of its duty of fair representation." *Id.* at 214, 103 S.Ct. at 590. Finding the employee's right to be made whole of paramount importance, the Court rejected the union's argument that it could not be held liable for any back pay. *Id.* at 219-20, 103 S.Ct. at 593. We read *Bowen* to simply hold that in order to make an employee whole, a union can be held liable for back pay to the extent the union caused the employee to suffer the lost wages.

The lower court's method of apportionment, or any particular method of apportionment, was not, however, before the *Bowen* Court for review. The lower court had instructed the jury that the issue of how to apportion damages between an employer and a union was left to its discretion. *Id.* at 215, 103 S.Ct. at 591. The *Bowen* lower court also indicated to the jury that it could base apportionment on the date of a hypothetical arbitration decision. *Id.* Although the Supreme Court let the jury verdict stand, it specifically stated that it was not deciding whether the lower court's instructions on apportionment of damages were proper. *Id.* at 230 n. 19, 103 S.Ct. at 599 n. 19. Moreover, the Court expressly reserved the issue of apportionment on the basis of fault, as both the employer and the union in *Bowen* were found to be equally culpable. *Id.*

Having determined that *Bowen* does not require the application of a chronological method of apportionment based on a hypothetical arbitration date, we must now determine whether the district court's application of a proportionate fault formula was proper. As a starting point, we recognize that suits under § 301 of the LMRA are governed by federal common law. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-57, 77 S.Ct. 912, 917-18, 1 L.Ed.2d 972 (1957). In other areas in which federal common law applies, we have used a proportion-

ate fault formula to apportion damages among two or more wrongdoers. *See e.g., United States v. Reliable Transfer Co.*, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975) (maritime collision actions); *Pope & Talbot Inc. v. Hawn*, 346 U.S. 406, 409, 74 S.Ct. 202, 98 L.Ed. 143 (1953) (admiralty personal injury actions). Liability based on proportionate fault has also been provided for, in certain instances, by Congress, *see e.g.*, Merchant Marine (Jones) Act, 38 Stat. 1185, as amended, 41 Stat. 1007, 46 U.S.C. App. § 688; Death on the High Seas Act, 41 Stat. 537, 46 U.S.C. App. § 766; Federal Employers' Liability Act, 35 Stat. 66, 45 U.S.C. § 53. Therefore, so long as the district court's application of a proportionate fault formula adequately advances the principles announced in *Vaca* and *Bowen*, we will uphold the district court's apportionment according to fault in this § 301 hybrid case.

Under *Vaca* and *Bowen*, the apportionment of damages between an employer and a union, in a hybrid § 301 case, must serve the following purposes: (1) damages must be apportioned according to each party's fault, *Vaca*, 386 U.S. at 197-98, 87 S.Ct. at 920-21, (2) the union must be held responsible for any increases in the employee's damages, which were caused by the union, *Bowen*, 459 U.S. at 222, 103 S.Ct. at 594, and (3) the employee must be made whole, *id.* at 219-20, 103 S.Ct. at 592-93. In serving these purposes, we also note that "[t]he appropriate remedy for a breach of a union's duty of fair representation must vary with the circumstances of the particular breach." *Vaca*, 386 U.S. at 195, 87 S.Ct. at 919.

We hold that the district court's apportionment of damages between Morrell and the Union based on proportionate fault in this hybrid § 301 case was proper. Apportioning damages based on proportionate fault, by definition, necessarily serves *Vaca*'s overriding purpose of apportioning "according to the damage caused by the fault

of each." *Id.* at 197, 87 S.Ct. at 920. Here, by using a proportionate fault method as opposed to the hypothetical arbitration date method, the court was able to apportion the majority of the damages to the primary wrongdoer, Morrell. If, on the other hand, the court was forced to apply the hypothetical arbitration date method, the majority of the back pay and benefits awarded may have been assessed against the Union even though the court found that the Union did not initiate the wrongful conduct and was not the primary wrongdoer. Further, the court's fault-based apportionment also served the *Bowen* principle that the union be held responsible for any increases in the employee's damages solely attributable to the union's breach. Of this we are convinced because the court specified that its apportionment took into account the time frames of both a hypothetical arbitration date and the 1979 Master Agreement. Accounting for these time frames implies that the court properly considered the Union's responsibility for delaying Plaintiffs' remedy. We also hold that the court's application of a proportionate fault method of apportionment served to make Plaintiffs whole because all of Plaintiffs' damages were assessed against either Morrell or the Union.[2]

In sum, we are not saying that the proportionate fault method of apportioning damages is always superior to the hypothetical arbitration date method in a hybrid § 301 case. Rather, we hold that the hypothetical arbitration date method is not required in every hybrid case, and we hold that under the circumstances of this "sham closing" breach of contract breach of fiduciary duty case, apportionment of damages based on proportionate fault was proper.

2.

Plaintiffs also contend that the district court's allocation of responsibility for seventy-five percent of the damages

[2] However, Plaintiffs' previous settlement with Morrell ultimately diminished their back pay award.

against Morrell and twenty-five percent against the Union was arbitrary. We review for clear error. *Chaparral Resources, Inc.*, 849 F.2d at 1289.

In apportioning damages, the court expressly found that "the evidence at trial [] indicated that Morrell was the initial and primary wrongdoer." Appellant App. at 166. Based on that finding, the court determined that it would be appropriate to apportion over half of the damages to Morrell. Moreover, in the court's view of all of the evidence, the seventy-five twenty-five apportionment was most consistent with the hypothetical time frame of an arbitration decision and the duration provision of the 1979 Master Agreement. Plaintiffs have presented no evidence that these findings were clearly erroneous, we therefore uphold the district court's decision to apportion seventy-five percent of the damages to Morrell and twenty-five percent to the Union.

E.

Finally, we address Plaintiffs' claim that the district court erred by limiting the period of damages to fifteen months. The district court held that damages were to be awarded from the date of the closing of the Rodeo Plant until September 1, 1983. Plaintiffs claim that to be made whole, the period of damages must run until February 17, 1987—the date that the settlement between Plaintiffs and Morrell was approved by the court.[3] Although we review the court's factual determination of the amount of damages under the clearly erroneous standard, "[w]e are not so constrained . . . when the trial court's computation of damages is predicated on a misconception of the governing rule of law." *Chaparral Resources, Inc.*, 849 F.2d at 1289.

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[3] Plaintiffs also contend that Section 100 of the 1979 Master Agreement contemplated damages for a five year term. We agree with the district court's determination that damages under this provision are subsumed in the damages to be awarded for Morrell's and the Union's Section 10-related breach. Therefore, the Section 100 provision cited by Plaintiffs does not extend the damages period.

In determining the time period for damages, the district court stated that damages in this case must have a basis in the 1979 Master Agreement. The court found that the 1979 Master Agreement did not terminate on September 1, 1982—the specified contract termination date—because Morrell's notice to the Union of its intent to terminate was invalid. The notice was invalid, the court found, because the notice was integral to Morrell's deceitful and fraudulent plant to close and reopen the Rodeo Plant. The court further found that, by the terms of the 1979 Master Agreement, if proper notice was not received by the Union, the contract continued to run from year to year until proper notice was given. Under this provision, the court awarded damages until September 1, 1983.

In *Bowen*, the Supreme Court recognized that principles of ordinary contract law do not necessarily govern the apportionment of damages in hybrid § 301 cases. 459 U.S. at 220, 224, 103 S.Ct. at 593, 595. First, the union's duty of fair representation is statutory, not contractual. *See Vaca*, 386 U.S. at 177, 87 S.Ct. at 910. Moreover, collective bargaining agreements are much more than simple contracts of hire. *Id.* 459 U.S. at 220, 103 S.Ct. at 593. "For, as the Court has noted, a collective bargaining agreement 'is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate.'" *Id.* (quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578, 80 S.Ct. 1347, 1350, 4 L.Ed.2d 1409 (1960)). A collective bargaining agreement creates relationships and interests as defined by the federal common law of national labor policy. *Id.* In hybrid § 301 cases, "[o]f paramount importance is the right of the employee, who has been injured by both the employer's and the union's breach, to be made whole." *Bowen*, 459 U.S. at 222, 103 S.Ct. at 595; *see also International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 48-49, 99 S.Ct. 2121, 2126, 60 L.Ed.2d 698 (1979) ("[t]he fundamental purpose of unfair representation suits is to compensate for injuries caused by violations of employees' rights").

Federal courts, in furtherance of our national labor policy, have taken an expansive approach, where appropriate, to damages and remedies for breach of a collective bargaining agreement. *See e.g., District 17 v. Allied Corp.*, 765 F.2d 412, 419-20 (4th Cir.) (en banc) (injunction issued requiring employer that breached collective bargaining agreement to continue to pay retired miners benefits), *cert. denied*, 473 U.S. 905, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1985); *Richardson v. Communications Workers of America*, 443 F.2d 974 (8th Cir.1971) (wrongfully discharged employee entitled to back pay beyond expiration date of collective bargaining agreement); *Local 127, United Shoe Workers v. Brooks Shoe Mfg. Co.*, 298 F.2d 277 (3d Cir.1962) (en banc) (damage award against union calculated on basis of hypothetical contract renewals for twenty years).

In *Richardson*, an employee brought a hybrid § 301 suit against his employer and union. 443 F.2d at 976-78. Upon a verdict for the employee against the employer, the district court reduced the amount of damages so that the employee's back pay award terminated with the expiration date of the collective bargaining agreement. *Id.* at 978. The Eighth Circuit reversed, holding that the employee was entitled to back pay extending beyond the expiration date of the agreement. The court reasoned that although the claim against the employer arose out of the collective bargaining agreement, "the terms of the agreement do not create the job and that no specific obligations to hire flows from it." *Id.* Recognizing that the collective bargaining agreement is not an ordinary contract, the court continued:

> The employment relationships which arise under it do not exist separate from it in a vacuum totally void of other relevant circumstances. The expiration date of a bargaining contract does not place the employee in jeopardy of losing his job at the termination of the agreement. In fact one of the very incentives to union representation is job security.

> The employee, the union which represents him, the company which employs him, each contemplate a 'subsisting' contractual relationship for an indefinite period of time. (citations omitted) This is particularly true in established industries where continual dealings with a recognized union foster renewals and renegotiations.

Id. at 978-79. Finding a strong likelihood of the employee's future employment, and the probability of the renewal of the collective bargaining agreement, the court concluded that it was error for the district court to have limited damages by the expiration date of the agreement. *Id.* at 979-80.

Given the above principles, we believe the court erred when it limited Plaintiffs' damages to fifteen months. First, in determining when Plaintiffs right to back pay and benefits terminated, we feel the court placed undue emphasis on the expiration date of the 1979 Master Agreement. Although the court alluded that it had discretion concerning the time period for damages, the court went to great lengths to tie the ending date of damages to the 1979 Master Agreement. We believe the court proceeded in this fashion because it was under the mistaken belief that general contract principles must govern the determination of the damages period. Because the court's computation of damages is predicated on a misconception of the governing rule of law, we will therefore not constrain ourselves to reviewing for clear error. *See Chaparral*, 849 F.2d at 1289.

Applying a more stringent review, we determine that the district court's limitation of damages to fifteen months does not serve to make Plaintiffs whole. Absent Morrell's sham closing and the Union's breach of duty, Plaintiffs were not in jeopardy of losing their jobs simply because the 1979 Master Agreement was terminated. Rather, Morrell and the Union have had a long-standing relationship, and over the years they have continued to negotiate Master Agreements. Like the parties in *Richardson*,

Plaintiffs, Morrell, and the Union each contemplated a continued contractual relationship between the expiration of one Master Agreement and the negotiation of the next. Also, as in *Richardson*, the likelihood of Plaintiffs' future employment with Morrell beyond the expiration of the 1979 Master Agreement was strong. As the jury found, Morrell would have not have closed the profitable Rodeo Plant absent bad motive, and furthermore, Morrell reopened the plant as ACPC within the year. Finally, we have persuasive evidence that a collective bargaining agreement between Morrell and the Union beyond the 1979 Master Agreement was likely, for here Morrell and the Union entered into a new Master Agreement in 1982. All of these factors tend to show that, absent Morrell's sham closing and the Union's breach, Plaintiffs would have enjoyed continued employment at the Rodeo Plant beyond the expiraton of the 1979 Master Agreement, and therefore, limiting Plaintiffs' damages to September 1983 (the district court's factual determination of the date of the 1979 Master Agreement's expiration) will not make them whole.

Instead, we hold that in this hybrid § 301 case, damages must be awarded to Plaintiffs from the date of the Rodeo Plant closing until February 17, 1987—the date that the settlement between Plaintiffs and Morrell was approved by the court. Back pay liability normally runs until the employer makes a valid, unconditional reinstatement offer. *NLRB v. Louton, Inc.*, 822 F.2d 412, 415 (3d Cir.1987). A back pay claimant who rejects a valid reinstatement offer is therefore not entitled to back pay for the period after the rejection of the offer. *NLRB v. Betts Baking Co.*, 428 F.2d 156 (10th Cir.1970). In the same manner, a waiver of all rights to reinstatement via a settlement with the employer operates to cut off all liability for back pay. *See Foust v. International Bhd. of Elec. Workers*, 572 F.2d 710 (10th Cir.1978) (damages awarded in hybrid § 301 case from date of discharge until date plaintiff set-

tled with his employer and waived reinstatement), *rev'd in part on other grounds,* 442 U.S. 42, 99 S.Ct. 2121, 60 L.Ed.2d 698 (1979). Applying this general rule of awarding back pay and benefits until rejection of an offer of reinstatement is the only way Plaintiffs can be made whole—*i.e.*, put in the same position as if Morrell had not breached the 1979 Master Agreement and the Union had not breached its duty of fair representation.[4] Accordingly, we remand to the district court for calculation of Plaintiffs' damages from June 19, 1982 until February 18, 1987.[5]

IV. CONCLUSION

The district court's denial of the Union's motion for JNOV, or in the alternative, for new trial is AFFIRMED. The district court's judgment as to damages is REVERSED, and this case is REMANDED for further proceedings consistent with this opinion.

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[4] We find the Union's reliance on *International Bhd. of Elec. Workers v. A-1 Elec. Serv.*, 535 F.2d 1 (10th Cir.), *cert. denied*, 429 U.S. 832, 97 S.Ct. 94, 50 L.Ed.2d 96 (1976), unpersuasive. *A-1 Elec.* was not a hybrid § 301 case; rather, it was a breach of contract action by a union against an employer. In *A-1 Elec.*, we *extended* an award of damages so that the award terminated with the expiration of the collective bargaining agreement. 535 F.2d at 4. In doing so, we expressly determined that we were exercising our "power . . . under section 301(a) to fashion a remedy that encourages the [national labor policy of] enforcement of collective bargaining agreements." *Id.* at 3. Likewise here, our holding furthers the policy of making the aggrieved employee in a hybrid § 301 suit whole.

[5] Of course, the determination of Plaintiffs' damages is subject to our holding *supra* part III.A, that the Union must be given an opportunity to present evidence that not all members of Plaintiff class would have retained their jobs even in the absence of breaches by Morrell and the Union.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. 83-1858-T

STEPHEN T. AGUINAGA; WAYNE PAPPAN; JANET BROWN, Individually and on behalf of all other union members similarly situated,

Plaintiffs,

v.

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO CLC,

Defendant.

MEMORANDUM AND ORDER

[Filed Feb. 10, 1992]

This matter is before the court on the defendant's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. Doc. 662. The matter has been extensively briefed and the court is prepared to rule. For the reasons set forth in this memorandum and order, the motion shall be denied. The court shall rule on the plaintiffs' pending application for attorney fees in a separate memorandum and order.

This class action was brought by plaintiffs, who are a class of former employees of former defendant John Morrell & Co.'s Rodeo Meats plant in Arkansas City, Kansas. Plaintiffs were members of defendant United Food & Commercial Workers International Union ("Union") and its Local 340 during the course of their employment at Rodeo Meats. Plaintiffs alleged that John Morrell &

Co. ("Morrell") (who settled with the plaintiff class before trial) breached several provisions of the collective bargaining agreement (the 1979 Master Agreement) and that the Union breached its duty of fair representation in its handling of Morrell's breaches.

The court previously ordered separate trials for the liability and damage issues in this case. Jury trial on the liability issues commenced in early 1988 and lasted several weeks. The jury trial on liability resulted in a verdict in favor of the plaintiff class. The Union filed a premature motion for judgment notwithstanding the verdict, which the court denied. Likewise, the court declined to certify the jury's verdict for interlocutory appeal. The court trial on damages was delayed over a long period of time by requests for continuances while the damage issues were being briefed and mathematical computations were being made. After a lengthy briefing process, the court issued certain rulings on the extent of damages recoverable by the plaintiffs. The court later determined that a formal trial on damages was not necessary and that the matter could be resolved on the briefs. Thereafter, entry of judgment was delayed by the expressions from the parties—especially the Union—that prospects for settlement were good. The conduct of counsel throughout this entire proceeding has been both adversarial and dilatory, despite the court's exhortations to the parties that the plaintiff class deserved expedition of their cause of action. When it appeared to the court that settlement was not going to occur, the court determined the amount of damages to be awarded to the plaintiff class and entered judgment accordingly. The present motion followed.

In reviewing a motion for judgment notwithstanding the verdict (JNOV), the court applies the same standard governing directed verdicts. *Hurd v. American Hoist & Derrick Co.*, 734 F.2d 495, 498 (10th Cir. 1984). It is not the function of the court to weigh the evidence or to make credibility determinations. *Id.* at 499. Rather, "the

trial court must view the evidence most favorably to the party against whom the motion is made, and give that party the benefit of all reasonable inferences." *Id.* at 498. Thus, the court may grant a motion for JNOV "only if the evidence points but one way and is susceptible to no reasonable inference which may support the opposing party's position." *O.E.R., Inc. v. Hickerson,* 880 F.2d 1178, 1180 (10th Cir. 1989).

In its alternative motion for new trial, the Union argues that the jury's verdict was against the clear weight of the evidence. *See* Doc. 662, p. 2. It is well settled that the "district court has broad discretion in deciding whether to grant a motion for a new trial." *Patty Precision Products Co. v. Brown & Sharpe Mfg.*, 846 F.2d 1247, 1251 (10th Cir. 1988); *Royal College Shop v. Northern Insurance Co. of New York*, 895 F.2d 670, 677 (10th Cir. 1990). The trial court's decision on a motion for new trial will not be disturbed on appeal absent a strong showing of an abuse of discretion. *See Mason v. Texaco, Inc.*, 948 F.2d 1546, 1555 (10th Cir. 1991). A motion for new trial which is grounded on the jury's verdict being against the weight of the evidence generally presents a question of fact, not law, and is committed to the discretion of the trial court. *Brown v. McGraw Edison Co.*, 736 F.2d 609, 616 (10th Cir. 1984). On a motion for new trial alleging that the verdict is against the weight of the evidence, the court may weigh the evidence for itself. *Commons v. Montgomery Ward & Co.*, 614 F.2d 443, 449 (D. Kan. 1985); 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2806, at 44-45 (1973). However, "the more sharply the evidence conflicts, the more reluctant the judge should be to substitute his judgment for that of the jury." 11 C. Wright & A. Miller, *supra,* § 2806, at 44. A new trial may be granted on this ground only when the verdict is clearly, decidedly, or overwhelmingly against the weight of the evidence. *May v. Interstate Moving & Storage Co.*, 739 F.2d 521, 525 (10th Cir. 1984).

The jury found that Morrell breached the following two provisions of the 1979 Master Agreement:

> 10. The Management of the plant and the direction of the working force, including the right to hire, suspend or discharge for just cause, to assign to jobs, to transfer Employees within the plant, to increase and decrease the working force, to determine products to be handled, produced or manufactured, to establish schedules of production and the methods, processes and means of products or handling, is vested exclusively in the Company, provided this will not be used for the purpose of discrimination against any Employee or to avoid the provisions of this Agreement, or any local agreement. . . .
>
> 100.
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> . . . .
>
> (b) Within 5 years after the Company closes down or substantially terminates production operations at any plant or division or department of [a] plant covered by this Agreement, the Company will not enter into a contract or other similar arrangement whereby the Company agrees to purchase from a third party producer's plant located within 100 miles of the closed plant, division or department, the production output of such third party producer's plant or a volume of such output substantially equivalent to or exceeding the output of the closed Company plant, division or department, of the same product or substantially the same product which the Company produced at its closed plant or division or department thereof.

Plaintiffs' Exh. 1.

The evidence at trial established that prior to closing the Rodeo Meats plant, Morrell had formulated a secret plan to close the plant, purportedly permanently, and to reopen it nonunion at a later time in violation of section

10 of the 1979 Master Agreement. *See* Plaintiffs' Exh. 400-403. No later than December 19, 1981, Morrell had formulated its plan to close and later reopen several of its plants. On that date, Morrell sent the Union a six month notice of its intent to close the Rodeo Meats plant, pursuant to section 98(a) of the 1979 Master Agreement. Plaintiffs' Exh. 23. The plant was closed in June 1982 and the plaintiffs were paid severance benefits.

No later than September 9-10, 1982, the Union discovered what Morrell was planning. In the summer of 1982, Morrell and the Union engaged in negotiations on a new Master Agreement. A new agreement, the 1982 Master Agreement (Plaintiffs' Exh. 360) was eventually concluded. The 1982 Master Agreement covered Morrell's remaining facilities at Estherville, Iowa, Sioux Falls, South Dakota, and East St. Louis, Illinois.

On September 9 and 10, 1982, the Union entered into two side letter agreements with Morrell. The September 9 letter agreement affected the interpretation of section 101 of the Master Agreement. That section of the Master Agreement provides in pertinent part:

> New meat packing or processing plants or abattoirs which may be established by the Company shall come under the Master Agreement subject to the following:
>
> > (a) The plant shall be one which is either (1) carved out of an existing packing plant presently covered by the Master Agreement or (2) established in the greater Midwest (and for this purpose, Pennsylvania west of the Alleghenies shall be included in the Midwest) or the far West (excluding Southeast, Southwest or Northeast).

Plaintiffs' Exh. 360. The September 9 letter agreement provides in pertinent part:

> For purposes of Section 101(a)(2), the Company plants located at Forth Smith, Arkansas, El Paso, Texas and Arkansas City, Kansas shall be included in the Southwest and Memphis, Tennessee shall be included in the Southeast.
>
> In addition, the Southwest shall include the states of Arizona, New Mexico, Texas, Oklahoma and Arkansas. Southeast shall include Louisiana, Mississippi, Alabama, Georgia, Tennessee, Florida, North Carolina, and South Carolina.

Plaintiffs' Exh. 165. The September 10 letter agreement provided:

> The parties agree that nothing in the Master Agreement executed today precludes the Company from reopening previously closed plants located at El Paso, Texas, Forth Smith, Arkansas, Arkansas City, Kansas and Memphis, Tennessee and that if such plants are reopened, no provision of said Master Agreement requires that such plants be subject to said Master Agreement.

Plaintiffs' Exh. 166.

These two letter agreements specifically excluded the Arkansas City, Kansas plant from the coverage of the Master Agreement, thereby allowing Morrell to reopen the plant without having to recognize the Union or pay Master Agreement wages. The language of the two letter agreements made the Union aware that Morrell had planned all along to reopen its closed plants. The plant was reopened in March 1983 as Ark City Packing Company (ACPC). ACPC employed significantly fewer employees at a lower wage rate than Rodeo Meats employed under the 1979 Master Agreement.

Viewing the evidence in the light most favorable to the plaintiffs, the evidence showed that the Union discovered Morrell's plan to reopen the Rodeo Meats plant as a

nonunion plant. After the Union knew what Morrell was planning, it failed to remedy Morrell's breach. After Morrell put its plan into effect, the Union made some attempts to resolve the situation. The Union thereafter purposely let the matter drop. The Union had several potential motives for its conduct: to obtain status as the bargaining representative of the new ACPC employees at the expense of the former Rodeo Meats employees, to gain some advantage with Morrell in bargaining over other Morrell plants, or because of the officials' dislike of Local 340 officials.

During the liability phase of the trial, the Union presented evidence of the economic conditions in the meatpacking industry during the relevant times. The Union attempted to show that Morrell would have reduced production and decreased the workforce for legitimate economic reasons. The jury rejected the Union's theory, finding that Morrell's actions in closing the Rodeo Meats plant were not taken for legitimate business or economic reasons but were taken to avoid the provisions of the Master Agreement.

The jury's finding of a breach of section 100(b) was supported by evidence that, after Rodeo Meats closed, Morrell obtained substitute product from outside the 100 mile limit and shipped this product into Wichita, which is within a 100 mile radius of Arkansas City. This substitute product was stored, inventoried, and distributed from a cold storage facility Morrell rented in Wichita.

The jury further found that the Union breached its duty of fair representation by acting arbitrarily, discriminatorily, or in bad faith in acting or failing to act to remedy Morrell's breaches of the Master Agreement.

The defendant Union challenges the following specific findings of the jury in this case: (1) that Morrell breached section 100(b) of the 1979 Master Agreement; (2) that the Union acted arbitrarily, discriminatorily, or

in bad faith with respect to the breach; (3) that the plaintiffs' claim against the Union concerning section 100(b) was timely filed within the six month statute of limitations; (4) that the Union acted arbitrarily, discriminatorily, or in bad faith with respect to Morrell's breach of section 10 of the Master Agreement; (5) that the plaintiffs were excused from exhausting their remedies with regard to Morrell's breach of section 10; and (6) that the plaintiffs' claim against the Union was timely filed within the six month statute of limitations. Doc. 662. The Union is not challenging the jury's finding that Morrell breached section 10 of the 1979 Master Agreement. The Union is not challenging any of the court's instructions to the jury unless otherwise noted in this opinion.

The Union, in its memoraondum in support of its motion, has presented a laundry list of some twenty-nine (29) previous motions and other pleadings which it intends to incorporate by reference. The court will not here discuss any issue which has not been raised and argued in the motion and supporting memoranda.

I. Section 100(b)

The Union again seeks to set aside the jury's verdict with respect to section 100(b) of the 1979 Master Agreement. The court ruled in response to a previous motion for JNOV that the court would not set aside the jury's verdict. *See* Doc. 602 (memorandum and order dated March 21, 1989).

The jury found that Morrell breached section 100(b) of the 1979 Master Agreement, that the Union acted arbitrarily, discriminatorily, or in bad faith with respect to that breach, and that the plaintiffs' claim against the Union concerning section 100(b) was timely filed within the six month statute of limitations. However, the court specifically declined to award damages on the plaintiffs' section 100(b) claim. *See* Doc. 608 at pp. 16-17 (memorandum and order dated July 12, 1989). The court does

not believe it erred in submitting the questions to the jury on the section 100(b) claim. Nor does the court believe that there was error in the jury's verdict on the section 100(b) claim. Since no damages were awarded, the error, if any existed, was harmless.

II. Section 10

A. Breach of the Duty of Fair Representation

The Union refers in its reply brief to several of its proposed duty of fair representation instructions it argues the court should have given. The court finds that the instructions as a whole adequately set forth the law governing the Union's duty of fair representaton.

The court must address specifically the Union's argument that the court should have given the Union's proposed instruction number 29 on the standards governing the duty of fair representation. Attached as Exhibit B to the Union's reply brief (Doc. 691) is the Union's proposed jury instruction. *See* Doc. 416 (Union's proposed jury instructions). The proposed instruction provides that a union does not breach its duty of fair representation unless its actions constitute gross nonfeasance, hostile discrimination, bad faith *and* arbitrary and capricious conduct. The Union has asserted throughout this case that it cannot be liable for a breach of the duty of fair representation unless its conduct is found to be arbitrary, discriminatory, *and* in bad faith. The Union's proposed duty of fair representation instruction did not then and does not now correctly state the law.

The court instructed the jury that a union is liable for breach of the duty of fair representation if its conduct was arbitrary, discriminatory, *or* in bad faith. *See* Instruction 9. This duty of fair representation standard was taken from *Vaca v. Sipes*, 386 U.S. 171, 190 (1967), and remains to this day the correct statement of the law. The court stated in a previous opinion that the Union

may choose to ignore controlling United States Supreme Court precedent, but this court cannot. *See* Doc. 602 (memorandum and order dated March 21, 1989). Had the court given the Union's proposed duty instruction, the court would have committed reversible error. The Union cannot complain that the court failed to give an erroneous jury instruction.

The evidence presented at trial created a jury question on the Union's breach of the duty of fair representation. The two side letter agreements released all rights and claims the plaintiffs would have had against Morrell when the plant was reopened. Absent the side letter agreements, when Morrell reopened the Rodeo Meats plant, the plant would have been covered by the provisions of the Master Agreement. The plaintiffs would have been eligible for rehire at Master Agreement wages. The plaintiffs' rights were taken away by the execution of the side letter agreements.

The Union was aware of Morrell's plans to reopen the Rodeo Meats plant. The two side letter agreements allowed Morrell to consummate its plan to reopen free from the provisions of the Master Agreement. The Union concealed the existence of the side letter agreements, so that the plaintiffs did not know that their rights had been sacrificed. The evidence supports the jury's finding that the Union's conduct was arbitrary, discriminatory, or taken in bad faith. The Union deceived the plaintiffs by concealing the side letters. The Union acquiesced in Morrell's breach of contract. Contrary to the Union's arguments, this is not a case involving whether the Union could have achieved a better result through the collective bargaining process. There was sufficient evidence to support the jury's finding that the Union breached its duty of fair representation.

B. Exhaustion of Remedies

The Union argues that the plaintiffs were not excused from exhausting remedies and that Morrell repudiated the contract, giving plaintiffs immediate access to a court remedy.

The court instructed the jury that the plaintiffs were required to establish by a preponderance of the evidence that their failure to file a grievance was excused. The court further instructed the jury that plaintiffs' failure to exhaust would be excused if resort to the contractual grievance procedure would have been futile under all the facts and circumstances. *See* Instruction 23. The Union does not here challenge that instruction to the jury.

The Union quotes from plaintiffs' counsel's closing argument in its brief in support of its motion. However, statements and arguments of counsel are not evidence. The evidence presented at trial was sufficient for the jury to find that plaintiffs' pursuit of contractual remedies would have been futile.

The evidence indicated that after Morrell closed the plant and paid the plaintiffs severance benefits, the Union claimed to no longer represent the plaintiffs. The two side letter agreements allowed Morrell to reopen the Rodeo Meats plant without the protections of the Master Agreement. Morrell than reopened the plant. The Union chose to file an unfair labor practice charge instead of pursuing contractual remedies. The Union voluntarily dropped the unfair labor practice charge after the National Labor Relations Board decided to issue a complaint. The decision to withdraw the charge was kept secret. The inference arose that the Union acquiesced in Morrell's action to achieve status as the bargaining representative for the newly reopened plant. The evidence was so strong that the court originally did not intend to submit the futility issue to the jury. However, out of an abundance of caution, the court did submit the question. The evidence

was such that the jury could find that the Union was more interested in being recognized as the bargaining representative for the newly reopened plant than in continuing to represent the plaintiffs' interests. The evidence presented a jury question as to whether it would have been futile for the plaintiffs to attempt to exhaust remedies.

The Union argues that because Local 340—which the court dismissed at the close of the case—was found guilty of no wrongdoing, the plaintiffs could have pursued their grievances before it instead of the defendant (International) Union. However, the Union fails to take into consideration the nature of the evidence presented at trial. The evidence at trial indicated that the Union misrepresented matters to Local 340 as well. The Union kept the side letter agreements hidden from Local 340 officials. Local 340 officials did not become aware of the side letter agreements until some time after they were executed. The evidence showed that Local 340 officials protested strongly about the duplicity of its International Union. Local 340 could not remedy any wrongs of which it was unaware.

The Union's second argument is that Morrell repudiated the Master Agreement, giving the plaintiffs immediate access to a federal court remedy. The repudiation issue was not raised in the final pretrial order. *See* Doc. 317. Therefore, it was not an issue for trial. *See Hullman v. Board of Trustees of Pratt Community College*, No. 90-3072, —— F.2d ——, 1991 U.S. App. LEXIS 28359 (10th Cir. Dec. 4, 1991); Fed. R. Civ. P. 16(e). Additionally, the repudiation issue was not raised in the motion for a directed verdict. *See* Doc. 493. Since the question was not raised in the prior motion for a directed verdict, it cannot now be raised in the motion for JNOV. *See Dow Chemical Corp. v. Weevil-Cide Co.*, 897 F.2d 481, 486 (10th Cir. 1990).

C. Statute of Limitations

The Union argues that the claim of the plaintiff class regarding the side letter agreements is barred by the statute of limitations. The Union argues that certain members of the plaintiff class were aware of the side letters in mid-September 1982. The Union, however, is focusing on the wrong plaintiffs. The conduct of the class representatives --not the unnamed class members—is determinative of the statute of limitations issue. There was no evidence presented that the named plaintiffs were aware of the side letter agreements at the time of their execution.

A cause of action accrues when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged breach of duty. *E.g., Vallone v. Local Union 705*, 755 F.2d 520, 522 (7th Cir. 1984); *Aguinaga v. John Morrell & Co.*, 602 F. Supp. 1270, 1277 (D. Kan. 1985). The accrual question in a class action is governed by the conduct of the named plaintiffs. If the named representatives' claims are timely, the class plaintiffs' claims are timely. *See Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352-54 (1983).

The Union is not challenging the specific statute of limitations instruction given to the jury.

Although it was not relevant, the court allowed the Union to explore whether certain of the unnamed class members became aware of the side letter and their effect. The jury obviously rejected the Union's claim that this action was untimely because certain class members became aware of the side letters in September 1982 and that the remaining plaintiffs should have discovered the existence of the side letters earlier through the exercise of reasonable diligence.

Viewing the evidence in the light most favorable to the plaintiffs, the class representatives' claim was timely. There was evidence that the side letter agreements, exe-

cuted in September 1982—which allowed Morrell to reopen its closed plants free from the protections of the Master Agreement—were kept secret from the plaintiffs. The Rodeo Meats plant reopened as ACPC in March 1983. There was evidence that after the Rodeo Meats plant was reopened nonunion, the Union initially acted to protect the rights of the plaintiffs by filing an unfair labor practice charge. The Union filed an unfair labor practice charge against Morrell on March 30, 1983. In May 1983, the National Labor Relations Board (NLRB) announced that it was prepared to issue a complaint. While this event does not indicate that the charge had merit, it appeared to the plaintiffs that the Union was vigorously pursuing their rights against Morrell before the NLRB. Morrell and the Union requested that the NLRB hold further action on the charge. Thereafter, Morrell and the Union agreed that Morrell would recognize the Union as the exclusive bargaining representative of ACPC in exchange for a new collective bargaining agreement and withdrawal of the unfair labor practice charge. On July 25, 1983, the Union requested leave to withdraw the charge. The charge was withdrawn September 8, 1983. The class representative testified that they were not aware of the side letter agreements until after the charge was withdrawn. Plaintiffs filed suit on September 21, 1983. Viewing the evidence in the light most favorable to the plaintiffs, there was sufficient evidence for the jury to find that the Union lulled the plaintiffs into believing that it was pursuing their interests. The facts presented at trial were sufficient to create a jury question on the statute of limitations. The jury's answer to the special interrogatory on the statute of limitations is supported by the evidence.

Assuming that the cause of action would normally accrue at the time of the execution of the two letter agreements, the plaintiffs' claim was timely. The letter agreements were executed September 9 and 10, 1982. The evidence indicated, however, that Morrell and the Union intended to keep the letter agreements secret. The letter

agreements were kept secret from the plaintiffs. The named plaintiff class representatives all testified that they were not aware of the existence of the side letter until after the unfair labor practice charge was withdrawn.

The Union was afforded a fair trial. The evidence did not point only in the Union's favor. The verdict is supported by substantial evidence. The motion for JNOV or new trial shall be denied.

IT IS BY THE COURT THEREFORE ORDERED that the defendant's motion for judgment notwithstanding the verdict, or in the alternative, for new trial (Doc. 662) is hereby denied.

At Wichita, Kansas, this 5th day of February, 1992.

/s/ Frank G. Theis
FRANK G. THEIS
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. 83-1858

STEPHEN T. AGUINAGA, WAYNE PAPPAN, and JANET BROWN, individually and on behalf of all other Union members similarly situated,

Plaintiffs,

vs.

JOHN MORRELL & CO.; UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO CLC: and LOCAL UNION 340 UNITED FOOD AND COMMERCIAL WORKERS,

Defendants.

VERDICT

[Filed June 8, 1988]

We, the jury in the above entitled case, duly impaneled and sworn upon our oaths, answer the questions submitted by the Court as follows:

1. [If you answer "No" to any subpart of Question 1, proceed immediately to Question 2 without completing the remaining subparts of Question 1]

   (a) Did Morrell violate Section 100(b) of the 1979 Master Agreement?

   Yes X No

   (b) Did the Union act arbitrarily, discriminatorily, or in bad faith with respect to Morrell's breach of Section 100(b) of the 1979 Master Agreement?

   Yes X No

(c) Was the plaintiffs' claim against the Union as to Section 100(b) of the 1979 Master Agreement in this case timely filed within the six month statute of limitations?

Yes X No

2. [If you answer "No" to any subpart of Question 2, do not complete the remaining subparts of Question 2. Your deliberations are complete.]

(a) Did Morrell breach Section 10 of the 1979 Master Agreement?

Yes X No

(b) Did the Union act arbitrarily, discriminatorily, or in bad faith with respect to Morrell's breach of Section 10 of the 1979 Master Agreement?

Yes X No

(c) Were the plaintiffs excused from exhausting their remedies with regard to Morrell's breach of Section 10 of the 1979 Master Agreement?

Yes X No

(d) Was the plaintiffs' claim against the Union as to Section 10 of the 1979 Master Agreement in this case timely filed within the six month statute of limitations?

Yes X No

s R. Schmidt
Foreperson

Date 6 7 88

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

Case Number: 83-1858

STEPHEN T. AGUINAGA, WAYNE PAPPAN, and JANET BROWN, individually and on behalf of all other Union members similarly situated,

v.

JOHN MORRELL & CO.; UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO CLC; and LOCAL UNION 340 UNITED FOOD AND COMMERCIAL WORKERS,

---

JUDGMENT IN A CIVIL CASE

☒ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED

1. Judgment is hereby entered as to liability only against the defendant, United Food & Commercial Workers Union International, and in favor of the plaintiff class pursuant to the jury verdict form, a copy of which is attached and herein incorporated as a part of this judgment.

2. Defendant Local Union No. 340 is dismissed as a party defendant in this case.

APPROVED AS TO SUBSTANCE AND FORM:

s Frank G. Theis
FRANK G. THEIS
Senior Judge

RALPH L. DELOACH
Clerk

s By B. Hatchett
Deputy Clerk

Date: June 8, 1988

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. 83-1858-T

STEPHEN T. AGUINAGA, WAYNE PAPPAN, and JANET BROWN, Individually and on behalf of all other union members similarly situated,

Plaintiffs,

vs.

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO CLC,

Defendant.

OPINION AND ORDER

[Filed July 12, 1989]

I. INTRODUCTION

Following an eight week trial on the issue of liability in this hybrid breach of contract breach of duty of fair representation case brought pursuant to section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, the jury returned a verdict in favor of the plaintiff class. Specifically, the jury found that the plaintiffs' former employer, defendant John Morrell and Company (Morrell), which has settled with the plaintiffs and was not involved in the trial, breached two provisions of the collective bargaining agreement in effect during the relevant time periods (the 1979 Master Agreement). The jury further found that defendant United Food and Commercial Workers International Union (UFCW or Union)

breached the duty of fair representation which it owed to the plaintiffs in dealing with Morrell's breaches of the 1979 Master Agreement. The court directed a verdict in favor of defendant Local Union 340 at the close of all the evidence.

The court previously bifurcated the case into liability and damages phases. The damage phase is to be tried to the court. The parties have submitted briefs on the legal issues surrounding the damage phase. The court is now prepared to make certain preliminary rulings on damage issues which will govern the remainder of the case and determine the course of the damage trial.

The court notes that the same analysis applies to duty of fair representation suits brought in federal court pursuant to section 301 and unfair labor practice proceedings before the National Labor Relations Board. *See San Francisco Web Pressmen and Platemakers' Union No. 4 v. NLRB*, 794 F.2d 420, 424 n.7 (9th Cir. 1986). The court will therefore rely on NLRB cases in addition to section 301 cases.

In both its damage brief (Dk. No. 583) and its supplemental damages brief (Dk. No. 605), the Union makes several arguments that it cannot be held liable for any backpay to the plaintiff class. Some of the arguments are new; others have already been rejected by the court. The court finds the Union's position that it cannot, as a matter of law, be liable for backpay damages to be wholly without merit. The court therefore turns to the legal issues governing the assessment of liability and the measure of damages in the present case.

The jury found that Morrell breached the following two provisions of the 1979 Master Agreement:

> 10. The Management of the plant and direction of the working force, including the right to hire, suspend or discharge for just cause, to assign to jobs,

to transfer Employees within the plant, to increase and decrease the working force, to determine products to be handled, produced or manufactured, to establish schedules of production and the methods, processes and means of products or handling, is vested exclusively in the Company, provided this will not be used for the purpose of discrimination against any Employee or to avoid any of the provisions of this Agreement, or any local agreement.

. . . .

100. . . .

(b) Within 5 years after the Company closes down or substantially terminates production operations at any plant or division or department of [a] plant covered by this Agreement, the Company will not enter into a contract or other similar arrangement whereby the Company agrees to purchase from a third party producer's plant located within 100 miles of the closed plant, division or department, the production output of such third party producer's plant or a volume of such output substantially equivalent to or exceeding the output of the closed Company plant, division or department, of the same product or substantially the same product which the Company produced at its closed plant or division or department thereof.

Plaintiffs' Exh. 1.

The evidence at trial established and the jury found that Morrell had a surreptitious plan to close its Rodeo Meats plant in Arkansas City, Kansas, where the plaintiffs were employed, and to reopen it later as a nonunion plant in violation of section 10 of the 1979 Master Agreement. The plant was closed in June 1982, purportedly permanently, and the plaintiffs were paid severance benefits. The plant was reopened in March 1983 as Ark City Packing Company (ACPC). ACPC employed signifi-

cantly fewer employees at a lower wage rate than Rodeo Meats employed under the 1979 Master Agreement.

The jury's finding of a breach of section 100(b) was supported by evidence that, after Rodeo closed, Morrell obtained substitute product from outside the 100 mile limit and shipped this product into Wichita, which is within a 100 mile radius of Arkansas City. This substitute product was stored, inventoried, and distributed from a cold storage facility Morrell rented in Wichita.

The jury further found that the Union breached its duty of fair representation by acting arbitrarily, discriminatorily, or in bad faith in acting or failing to act to remedy Morrell's breaches of the Master Agreement. Specific facts and evidence will be discussed when necessary.

II. ASSESSMENT OF LIABILITY

A. *Apportionment vs. Joint and Several Liability*

Plaintiffs argue in their damages brief (Dk. No. 572) and reply brief (Dk. No. 584) that the Union should be held jointly and severally liable with Morrell for all damages suffered by the plaintiff class. Since Morrell has settled with the plaintiff class, the Union would be solely responsible for the payment of all damages awarded less the amount of Morrell's settlement. The Union argues that if liability is to be imposed, it must be apportioned between it and Morrell. The court agrees with the Union in this regard.

In discussing the imposition of damages against an employer and a union in a breach of contract breach of duty of fair representation case, the Supreme Court has stated:

> The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus, damages attributable solely to the employer's breach

> of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer.

Vaca v. Sipes, 386 U.S. 171, 197-98 (1967). In *Vaca*, the Court noted in dicta that it was

> not dealing here with situations where a union has affirmatively caused the employer to commit the alleged breach of contract. In cases of that sort where the union's conduct is found to be an unfair labor practice, the NLRB has found an unfair labor practice by the employer, too, and has held the union and the employer jointly and severally liable for any back pay found owing to the particular employee who was the subject of their joint discrimination. Even if this approach would be appropriate for analogous § 301 and breach-of-duty suits, it is not applicable here.

Id. at 197 n.18 (citations omitted).

The Supreme Court recently reaffirmed *Vaca*'s "governing principle" of allocation of responsibility in *Bowen v. United States Postal Service*, 459 U.S. 212 (1983). Of "paramount importance" is the right of the employee, who has been injured by both the employer's breach of contract and the union's breach of the duty of fair representation, to be made whole. *Id.* at 222. While both the employer and the union have caused damages to the employee, the union will be responsible for the increase in damages caused by its breach of duty. *Id.* at 223. While reaffirming the general rule that damages are to be apportioned between the employer and the union, the Court again noted in dicta that "this is not a situation in which either the union or the employer has participated in the other's breach." *Id.* at 223 n.11 (citing *Vaca*, 386 U.S. at 197 n.18). Under the general rule of *Vaca* and *Bowen*, liability must be apportioned; joint and several liability is the exception.

Plaintiffs cite several cases in support of their position that joint and several liability is appropriate in the present case. In two cases cited by the plaintiffs, the district courts did not impose joint and several liability. *Ryman v. Office and Professional Employees Int'l Union*, 628 F. Supp. 421, 427 n.7 (E.D. Tex. 1985) ("Because defendant Texaco played no part in the union's alleged breach of its duty of fair representation, it could not be held liable for that breach."); *Hardesty v. Essex Group, Inc.*, 550 F. Supp. 752, 768 (N.D. Ill. 1982) (no damages could be awarded against the union defendants because they did not participate in the employer's alleged wrongful discharge of plaintiff). *Hardesty* is unpersuasive for the additional reason that the court held (prior to the Supreme Court's decision in *Bowen*) that back pay could be assessed only against the employer and not against the union. *Id.* at 767.

In *Waters v. Wisconsin Steel Works*, 427 F.2d 476 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970), while the court stated that the union could be joined as a defendant if it was the "moving force in producing a violation of the contract by the employer," 427 F.2d at 491 n.26, the court further held that the union would be liable only for the damages flowing from its own conduct. *Id.* at 491.

Plaintiffs cite two duty of fair representation cases in which joint and several liability was imposed. In *Baskin v. Hawley*, 807 F.2d 1120 (2d Cir. 1986), the union neither requested an apportionment instruction nor objected to its absence at trial. On appeal the Second Circuit found no plain error and affirmed the imposition of joint and several liability. *Id.* at 1132. Further, joint and several liability was appropriate because the union had participated in the underlying wrongs. *Id.* at 1133. Plaintiffs also rely on *Jones v. Trans World Airlines, Inc.*, 495 F.2d 790 (2d Cir. 1974). In *Jones*, the employer was held jointly and severally liable with the unions be-

cause it agreed with the union to demote and lay off non-union employees. *Id.* at 798-99.

Joint and several liability may be imposed in a limited number of situations in light of the Supreme Court's footnotes in *Vaca* and *Bowen*. The Supreme Court has indicated that joint and several liability may be appropriate when either the union or the employer has caused or participated in the other's breach. *Bowen*, 459 U.S. at 223 n.11; *Vaca*, 386 U.S. at 197 n.18. The court thus must review the evidence presented in the liability trial of this case.

In the present case, plaintiffs presented no evidence that the Union caused or participated in Morrell's breaches of the 1979 Master Agreement. Prior to closing the Rodeo Meats plant, Morrell had formulated a secret plan to close the plant, purportedly permanently, and reopen it nonunion at a later time. *See* Plaintiffs' Exh. 400-403. After Morrell put its plan into effect, the Union made some attempts to resolve the situation. The Union later determined, however, to abandon the former Rodeo Meats employees. No evidence was presented indicating that the Union played a role in or had knowledge of Morrell's plan until the events were unfolding in the summer of 1982.

Morrell was the initiator of the scheme. No later than December 19, 1981, Morrell had formulated its plan to close and reopen several of its plants. On that date, Morrell sent the Union a six month notice of its intent to close the Rodeo Meats plant, pursuant to section 98(a) of the 1979 Master Agreement. Plaintiffs' Exh. 23. Morrell's breach was continuing in nature, since it concealed its plans from the Union. No evidence was presented to implicate the Union in the closing plan as of late 1981.

The Union knew or should have known during the summer of 1982, and no later than September 9-10, 1982, what Morrell was planning. In the summer of 1982,

Morrell and the Union engaged in negotiations on a new Master Agreement. A new agreement, the 1982 Master Agreement (plaintiffs' Exh. 360) was eventually concluded. The 1982 Master Agreement covered Morrell's remaining facilities at Estherville, Iowa, Sioux Falls, South Dakota, and East St. Louis, Illinois.

On September 9 and 10, 1982, the Union entered into two side letter agreements with Morrell. The September 9 letter agreement affected the interpretation of section 101 of the Master Agreement. That section provides in pertinent part:

> New meat packing or processing plants or abattoirs which may be established by the Company shall come under the Master Agreement subject to the following:
>
> > (a) The plant shall be one which is either (1) carved out of an existing packing plant presently covered by the Master Agreement or (2) established in the greater Midwest (and for this purpose, Pennsylvania west of the Alleghenies shall be included in the Midwest) or the far West (excluding Southeast, Southwest or Northeast).
> >
> > . . . .

Plaintiffs' Exh. 360. The September 9 letter agreement provides in pertinent part:

> For purposes of Section 101(a)(2), the Company plants located at Fort Smith, Arkansas, El Paso, Texas and Arkansas City, Kansas shall be included in the Southwest and Memphis, Tennessee shall be included in the Southeast.
>
> In addition, the Southwest shall include the states of Arizona, New Mexico, Texas, Oklahoma and Arkansas. Southeast shall include Louisiana, Mississippi, Alabama, Georgia, Tennessee, Florida, North Carolina and South Carolina.

Plaintiffs' Exh. 165. The September 10 letter agreement provided:

> The parties agree that nothing in the Master Agreement executed today precludes the Company from reopening previously closed plants located at El Paso, Texas, Fort Smith, Arkansas, Arkansas City, Kansas and Memphis, Tennessee and that if such plants are reopened, no provision of said Master Agreement requires that such plants be subject to said Master Agreement.

Plaintiffs' Exh. 166. These two letter agreements specifically excluded the Arkansas City plant from the coverage of the Master Agreement, thereby allowing Morrell to reopen the plant without having to recognize the Union or pay Master Agreement wages. The language of the two letter agreements along with other direct and circumstantial evidence upon which the jury must have relied should have made the Union aware that Morrell had planned all along to reopen its closed plants.

The evidence presented at trial indicated that after the Union knew or should have known what Morrell was planning, it failed to take the appropriate steps to remedy Morrell's breach. The Union's conduct is similar to that of a union who fails to process a meritorious grievance in the typical duty of fair representation case. The Union's conduct in the present case was not of the egregious nature required for the imposition of joint and several liability. Joint and several liability shall not be imposed in the present case. To hold otherwise would result in the imposition of joint and several liability in virtually all hybrid breach of contract breach of duty of fair representation cases. Such a result is not contemplated by *Bowen* and *Vaca*.

B. *The Apportionment Formula*

Plaintiffs have only briefly addressed apportionment of damages in their reply brief. The court has determined that two methods of apportioning damages exist.

The court may apportion damages on a percentage basis, similar to comparative fault. This method has some appeal in that the court would be able to apportion damages according to the relative fault of Morrell and the Union. Under a percentage apportionment theory, the court could assess less than 50% of the fault against the Union. This would be consistent with the evidence at trial which indicated that Morrell was the initial and primary wrongdoer. The court has not, however, found any cases which apply this apportionment rule or discuss how it shall be determined on a mathematical basis. The court's judgment must be based on a consideration of all the evidence.

The second method of apportionment is based upon the hypothetical date upon which the plaintiffs would have been reinstated had the Union fulfilled its duty of fair representation. This method of apportionment does have case law support in the context of unfair labor practice charges before the NLRB and hybrid suits in federal court:

> An employer and a union are jointly and proportionately liable for backpay when the employer has caused damage by wrongfully discharging the employee and the union has increased that damage by breaching its duty of fair representation. The employer and union each are liable for the portion of damages that it caused: the employer for back pay from the date of the wrongful termination to the date the employee would have been reinstated had the union not breached its duty, and the union for backpay thereafter.

San Francisco Web Pressmen and Platemakers' Union No. 4 v. NLRB, 794 F.2d 420, 424 (9th Cir. 1986) (citations and footnote omitted) (unfair labor practice proceeding). *See also Colon Velez v. Puerto Rico Marine Management, Inc.*, 693 F. Supp. 1335, 1344 (D.P.R. 1988) (hybrid breach of contract breach of duty of fair representation case).

The trial court in *Bowen* instructed the jury that the issue of apportionment of damages was left to the jury's discretion. The trial court further instructed that the jury could base apportionment on the date of a hypothetical arbitration decision, *i.e.*, the date upon which the employer would have reinstated the employee had the union fulfilled its duty. *See Bowen*, 459 U.S. at 215. The precise method of apportionment was not before the Supreme Court in *Bowen*, however. *Id.*, at 214 ("The issue is whether a union may be held primarily liable for that part of a wrongfully discharged employee's damages caused by his union's breach of its duty of fair representation.").

In a dissenting opinion, Justice White characterized the majority as holding:

> that an employer who wrongfully discharges an employee protected by a collective-bargaining agreement with an arbitration clause is only responsible for backpay that accrues prior to the hypothetical date upon which an arbitrator would have issued an award had the employee's union taken the matter to arbitration. All backpay damages that accrue after this time are the sole responsibility of the union, even where, as here, the union is in no way responsible for the employer's decision to terminate the employee.

Bowen, 459 U.S. at 230-31 (White, J., concurring in the judgment in part and dissenting in part). Contrary to the opinion of the dissenters in *Bowen*, this court does not believe that the Supreme Court has approved this hypothetical date theory of apportionment.

Application of this particular method of apportionment necessarily hinges on the grievance and arbitration provisions of the 1979 Master Agreement. The court has determined that backpay will be awarded based on Morrell's violation of section 10 of the 1979 Master Agreement, the section 100(b) violation being subsumed in

the section 10 violation (*see infra* § III.A). To apportion damages according to the hypothetical arbitration date, the court would have to determine the length of time necessary to work through the various steps of the grievance process in light of when the violation occurred. A drawback to this method of apportionment is that a union may bear a majority of the backpay awarded (*e.g.*, approximately two-thirds of the backpay in *Bowen*, 459 U.S. at 217 n.6) even though it did not initiate the wrongful conduct and was not the primary wrongdoer. A further disadvantage is that the district court is required to engage in considerable guesswork in arriving at the dates when the various stages of the grievance procedure would have been completed had they been initiated by the union.

While a jury may apportion damages in a hybrid case in any way it sees fit, *see, e.g.*, 3 E. Devitt, C. Blackmar & M. Wolff, *Federal Jury Practice and Instructions* § 96.17 (4th ed. 1987), this court must be able to explain its conclusions in some rational manner. After considering the two methods of apportionment, the court has determined to apportion damages on a percentage fault basis. The court believes that this method of apportionment is consistent with both the hypothetical time frame of an arbitration decision and the duration provision of the 1979 Master Agreement. After reviewing the evidence presented at the liability trial, the court concludes that 75% of the damages should be assessed against Morrell and 25% assessed against the Union. The court's decision to apportion damages is a final one. The court will not address joint and several liability further. At the damage trial, certain evidentiary matters may remain. However, the court does not believe that the method of apportionment is a factual issue.

III. DAMAGES

The purpose of an award of backpay (including fringe benefits) is to make employees whole for the losses suffered. *Bowen v. United States Postal Service*, 459 U.S.

212, 223 (1983); *NLRB v. Master Slack*, 773 F.2d 77, 83 (6th Cir. 1985). In unfair labor practice proceedings, the NLRB's task is to find a remedy that will restore the economic status quo that would have obtained but for the unfair labor practice. Remedies that award employees more than they would have received but for the violations are punitive and thus improper. *See NLRB v. Fort Vancouver Plywood Co.*, 604 F.2d 596, 602 (9th Cir. 1979), *cert. denied*, 445 U.S. 915 (1980); *see also Kallmann v. NLRB*, 640 F.2d 1094, 1103 (9th Cir. 1981); *NLRB v. J. S. Alberici Construction Co.*, 591 F.2d 463, 468, 470 n.8 (8th Cir. 1979). Thus, only one recovery is allowed, even if the employer and the union committed multiple breaches. The damage formula the court chooses must give a close approximation of the amounts due. Damages need not be proven with exactitude, however. *NLRB v. Overseas Motors, Inc.*, 818 F.2d 517, 521 (6th Cir. 1987). The Union complains in its damage brief that certain of plaintiffs' damage computations are speculative. It is due to Morrell's and the Union's wrongful conduct, however, that plaintiffs were damaged. The Union cannot now complain that plaintiffs' damages are incapable of being computed with exactitude.

In determining the amount of backpay due the plaintiffs, the court must determine the total amount of backpay for which Morrell and the Union would have been liable had there been no settlement. Morrell's share of the backpay must be assessed against it conceptually as if no settlement had been reached.

In the sections which follow, the court will set out its preliminary conclusions on the damage variables. The parties may wish to present evidence on these matters during the damage trial, if relevant evidence exists. The court believes that the gross amount of backpay (excluding fringe benefits) is uncontroverted at this point, since the number of plaintiffs in the class, the wage rate received before closing, and the average number of hours worked

per week before the closing are beyond good faith dispute. The Union may wish to prove that, absent Morrell's scheme, Morrell still would have decreased production and demanded wage cuts. The court must point out that it was the Union's duty to prevent these matters from occurring.

A. *Section 10 vs. Section 100(b)*

Plaintiffs assert that because the jury found a violation of section 100(b) of the 1979 Master Agreement each plaintiff is entitled to five years' backpay and related damages. The court must reject this theory. Damages will be awarded based on the section 10 violation, which is supported by sufficient evidence and law. As the court noted several times during the course of the liability trial, the section 100(b) claim rested on a shaky legal and factual foundation.

While section 100(d) authorized an arbitrator to award damages for a violation of section 100(b), it did not authorize an automatic five year backpay award regardless of the duration of the breach. In the present case, the section 100(b) breach did not last for five years. Further, section 100(b) served as a limitation of Morrell's conduct and not as a job protection measure. Section 100(b) operated in the nature of an injunction or a covenant not to compete by prohibiting Morrell from taking certain actions. Even though the section was seen by the plaintiffs as a job protection measure, it did not guarantee any jobs. Unlike section 10, section 100(b) had no relation to the actual operation of the Rodeo plant (hours, number of employees, type of work, etc.). Finally, section 100(b) provided no method of computing damages in any reasonable way.

Section 10 is the broader of the two contractual provisions. Since the plaintiffs may obtain only one recovery, any damages for the breach of section 100(b) are sub-

sumed within the recovery for the breach of section 10. Consequently, damages will be awarded based solely on the breach of section 10.

B. *Duration of Damage Period*

In determining the length of the damage period, the court was faced with a wide range of choices but found little guidance in the case law. The court will first address the parties' claims on the appropriate duration of the damage period.

Plaintiffs first assert that damages for backpay and benefits run to the date of judgment. The sole case plaintiffs cite provides little to support their position. *See De Arroyo v. Sindicato de Trabajadores Packinghouse*, 425 F.2d 281 (1st Cir.) (lost earnings awarded to date of judgment when not contested by the parties), *cert. denied sub nom. Puerto Rico Tel. Co. v. De Arroyo*, 400 U.S. 877 (1970).

Plaintiffs next assert that they are entitled to backpay for a period of five years based upon the violation of section 100(b) of the 1979 Master Agreement. As discussed *supra* § III.A, the jury's finding of a violation of section 100(b) rests on a shaky factual and legal basis. The court has determined not to award separate damages for the violation of section 100(b). Rather, those damages are subsumed in the damages to be awarded for the breach of section 10.

The Union asserts that no backpay can be awarded past the September 1, 1982 expiration date of the 1979 Master Agreement. In support of its position, the Union cites a number of cases involving breaches of collective bargaining agreements. Damages for a breach of a collective bargaining agreement accrue until the expiration of the agreement. *See International Bhd. of Elec. Workers v. A-1 Elec. Serv., Inc.*, 535 F.2d 1 (10th Cir.), *cert. denied*, 429 U.S. 832 (1976). The cases cited by the Union are not hybrid cases and do not address the appropriate term

of damages in a hybrid case such as the present action. The position taken by the Union would result in the same measure of damages in a hybrid action as in a breach of contract action. No additional damages would be assessed for the Union's arbitrary, discriminatory, or bad faith treatment of plaintiffs following Morrell's breach of contract.

The court is aware of one district court which has applied the standard asserted by the Union. *See Colon Velez v. Puerto Rico Marine Management, Inc.*, 693 F. Supp. 1335 (D.P.R. 1988). In *Colon Velez*, the district court stated, without authority or reasoning, that the termination of backpay liability "obviously coincides with the termination of the collective bargaining agreement." *Id.* at 1345. The court does not find this decision to be particularly persuasive.

A union's duty of fair representation is not contractual, but is statutory. *See Vaca v. Sipes*, 386 U.S. 171, 177 (1967). A hybrid breach of contract breach of duty of fair representation case is not the same as a common law contract case. *See Bowen v. United States Postal Service*, 459 U.S. 212, 220 (1983). The court believes, however, that damages in a hybrid case must have a contractual basis. Morrell breached the contract. It was the contract that determined the terms and conditions of employment, *i.e.*, the status quo from which damages are to be computed. It was the contract which determined the plaintiffs' rights to continued employment.

While the court believes that the damages to be awarded must have a contractual basis, the court does not believe the damage term should be as limited as the Union proposes. Accepting the proposition that the expiration of the 1979 Master Agreement cuts off backpay liability, the court finds the September 1, 1982 cutoff date to be incorrect. The Union's contention that the 1979 Master Agreement expired on September 1, 1982 is based on Morrell's notification to the Union of its intent to terminate

the agreement. *See* Plaintiffs' Exh. 340. Morrell's notice of intent to terminate was an integral part of its plan to pretend to close the plant and reopen nonunion. The court believes that Morrell's fraud and deceit renders the termination notice invalid. Pursuant to section 112 of the 1979 Master Agreement, the contract would not have expired on September 1, 1982. Section 112 provides:

> Except as otherwise provided, all of the provisions of this Agreement shall take effect as of September 1, 1979, and shall remain in effect until September 1, 1982, and from year to year thereafter, provided, however, that this Agreement may be terminated on September 1, 1982, or on September 1 of any year thereafter by either party by written notice mailed to the Company at its general office, or to the Union at its national headquarters at least sixty (60) days prior to September 1, 1982, or prior to September 1 of any year thereafter.

Plaintiffs' Exh. 1. Pursuant to section 112, the court could award damages for backpay and benefits from the date of closing to at least September 1, 1983.

The maximum term for which damages could be awarded would run from the date of closing to February 18, 1987, the date the court approved the plaintiffs' settlement with Morrell. As a part of the settlement, plaintiffs expressly gave up their right to reinstatement. Dk. No. 240. Backpay liability normally runs until the employer makes a valid, unconditional reinstatement offer. *NLRB v. Louton, Inc.*, 822 F.2d 412, 415 (3d Cir. 1987); *Polynesian Cultural Center, Inc. v. NLRB*, 582 F.2d 467, 475 (9th Cir. 1978). A claimant who rejects a valid reinstatement offer is therefore not entitled to backpay for the period after the rejection of the offer. In the same manner, the plaintiffs' waiver of all rights to reinstatement via the settlement with Morrell operates to cut off all liability for backpay. *Cf. Foust v. International*

Bhd. of Elec. Workers, 572 F.2d 710 (10th Cir. 1978) (damages awarded from date of discharge until date plaintiff settled with his employer and waived reinstatement), *rev'd in part on other grounds*, 442 U.S. 42 (1979).

The court believes a middle ground between the Union's proposal of under three months and plaintiffs' proposal of over five years to be appropriate. The court believes preliminarily at least, that damages should be awarded from the date of the closing of the Rodeo Meats plant until September 1, 1983. The court remains mindful that Morrell had broad rights to decrease production or change the methods of production and distribution. Plaintiffs were not guaranteed lifetime jobs pursuant to the Master Agreement. The length of the damage period may be an evidentiary matter that the parties should address at trial.

C. *Number of Plaintiffs*

Once the breach of contract and breach of duty of fair representation are shown, the court begins with the presumption that all members of the plaintiff class are entitled to backpay. The defendant must then establish that fewer employees are entitled to damages. In the present case, the Union bears the burden of proving by a preponderance of the evidence that certain employees would have been discharged or laid off at a later date, that certain jobs would have been phased out, or that fewer jobs would have been available, even if no breach of contract and breach of duty of fair representation had occurred. *See NLRB v. Master Slack*, 773 F.2d 77, 83 (6th Cir. 1985); *NLRB v. C. R. Adams Trucking, Inc.*, 767 F.2d 1276, 1277 (8th Cir. 1985); *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1353 (7th Cir. 1984); *Kallmann v. NLRB*, 640 F.2d 1094, 1102 (9th Cir. 1981); *NLRB v. Fort Vancouver Plywood Co.*, 604 F.2d 596, 602-03 (9th Cir. 1979), *cert. denied*, 445 U.S. 915 (1980).

Pursuant to section 10 of the 1979 Master Agreement, Morrell had broad rights to decrease the work force, provided the decrease was not for the improper purpose of avoiding the requirements of the Master Agreement. The Union will be given the opportunity to prove at trial that Morrell would have scaled producton back at the Rodeo Meats plant had the plant remained open. The fact that ACPC reopened with approximately 200 employees (compared to the over 600 members of the plaintiff class) may be evidence of Morrell's intent to decrease production or change the methods of production and distribution, but is not determinative. No evidence was presented during the liablity trial that Morrell ever expressed an intention to reduce output at the Rodeo Meats plant.

D. *Wage Rate*

Since the purpose of an award of backpay is to restore the economic status quo, *see supra*, the award of backpay must be based, at least initially, on the wage rate contained in the 1979 Master Agreement. After September 1, 1982, the expiration date of the 1979 Master Agreement (or September 1, 1983, the expiration date following a one year extension), the appropriate wage rate could be the lower chain rate contained in the 1982 Master Agreement, in view of the evidence that the Union wanted all local unions at the various Morrell plants to stay "hitched to the chain." UFCW policy was to negotiate one Master Agreement to cover all plants; individual local unions were not to negotiate with Morrell. Absent Morrell's conduct in closing the plant, it is probable that the Rodeo plant would have been governed by the new Master Agreement in effect at the remaining Morrell plants. The new "chain" rate contained in the 1982 Master Agreement takes into account the changed economic circumstances in the meat packing industry.

The court will not use the wage rates paid at ACPC to compute backpay. The initial wage rate paid upon the

reopening of ACPC was not achieved through collective bargaining and does not accurately reflect the economic conditions in the industry. Rather, the initial ACPC rate was unilaterally imposed by Morrell. The court also rejects the Union's argument that the wage rate obtained when the Union reached a contract at ACPC should govern. The new contract was not a part of the Master Agreement and, as such, deviated from the Union's policy of staying hitched to the chain.

E. *Hours Per Week*

The case law reflects two methods of determining the number of hours per week for which a discriminatee is entitled to compensation. First, the court may award backpay based on the hours each individual worked in the years before the violation. *NLRB v. Laborers' Int'l Union*, 748 F.2d 1001, 1004 (5th Cir. 1984), *cert. denied*, 470 U.S. 1085 (1985). Second, the court may award back pay based on the representative employees method. This method requires averaging the earnings during the backpay period of other employees who were earning the same as the discharged employee at the time of the discharge. *NLRB v. S. E. Nichols of Ohio, Inc.*, 704 F.2d 921, 924 (6th Cir.), *cert. denied*, 464 U.S. 914 (1983). A variation of this method requires a comparison between the discriminatee and one representative employee. *NLRB v. Overseas Motors, Inc.*, 818 F.2d 517, 520 (6th Cir. 1987).

The court cannot use the representative employees method because there are no representative employees to serve as a comparison. Morrell closed the Rodeo plant and discharged the entire work force. The court therefore cannot look to other employees to determine what hours the plaintiffs would have worked had the Rodeo plant stayed open. The court will therefore begin by awarding backpay based on the prior hours worked by each plaintiff. Plaintiffs have proposed using the average hours

worked per week by each plaintiff in the eighteen months prior to the plant closing. The court finds this to be a reasonable approximation of the hours the plaintiffs would have worked, at least initially, had the Rodeo plant remained open.

Since the Union has the burden of proving, and must be given the opportunity to prove, that less work would have been available, *see supra,* the Union will be given the opportunity to prove that the plaintiffs' hours would have been cut back had the Rodeo plant remained open. The experience at ACPC may be relevant but is not determinative, since the Union and the Company were "sleeping" together at that time.

F. *Benefits*

1. Health Benefits

Medical insurance or other health benefits are recoverable as a part of the damage award. The specifics of Morrell's health benefits plan are not before the court at this time. *See* Plaintiffs' Exh. 1, § 104 & App. F (stating that the health insurance plan is contained in a separate booklet). Plaintiffs refer to Plaintiffs' Exh. 2, which has not been admitted into evidence.

Plaintiffs have requested damages for the loss of health benefits in an amount based on the average monthly cost incurred by Morrell per worker during the one year period prior to closing. Alternatively, plaintiffs seek damages based on the average monthly cost per worker at Morrell's Sioux Falls, South Dakota plant during the years 1982-86. The Union asserts that plaintiffs may be compensated only for their out of pocket losses.

Plaintiffs may be compensated for the loss of their medical benefits if plaintiffs have purchased substitute insurance coverage or have incurred out of pocket, uninsured medical expenses which would have been reim-

bursed under the employer's plan. *See Galindo v. Stoody*, 793 F.2d 1502, 1517 (9th Cir. 1986) (citing *Foust v. International Bhd. of Elec. Workers*, 572 F.2d 710, 718 & n.1a (10th Cir. 1978), *rev'd in part on other grounds*, 442 U.S. 42 (1979)). To recover for the loss of health benefits, plaintiffs might need to establish the actual medical expenses or costs of substitute insurance coverage for each plaintiff during the damage period. Further evidence and briefing should clarify this point.

2. Other Benefits

The Union does not dispute that plaintiffs' pension losses are recoverable. The pension agreement is not before the court. *See* Plaintiffs' Exh. 1, § 102 & App. G (stating that the pension agreement is contained in a separate booklet). Plaintiffs refer to Plaintiffs' Exh. 2, which has not been admitted into evidence. The court can make no specific ruling at this time.

Any other fringe benefits existing at the time of Morrell's breach shall also be recoverable. *Galindo*, 793 F.2d at 1517-18.

C. *Prejudgment Interest*

Both parties concede that prejudgment interest on a backpay award is discretionary. The court has considered the arguments contained in the briefs and has determined that prejudgment interest shall be allowed.

D. *Attorneys' Fees*

Both parties acknowledge that attorneys' fees may be a potential item of damages in hybrid breach of contract/breach of duty actions. Plaintiffs concede that an award of attorneys' fees is premature. Specifics should be dealt with in an application for attorneys' fees following entry of judgment on damages. The Union disputes that any attorneys' fees are recoverable from it in this action. The

court will reserve final ruling until the matter is ripe for consideration, but advises the Union that it should be prepared to pay such fees and consider such item in any settlement discussions.

IV. SETOFFS

A. *In General*

The burden is on the plaintiffs to prove the gross amounts of backpay and related damages due each of them. The burden then shifts to the defendant to demonstate any reductions in the amount of backpay or any facts which would mitigate its liability. *Lundy Packing Co. v. NLRB*, 856 F.2d 627, 629 (4th Cir. 1988); *Kawasaki Motors Mfg. Corp., U.S.A. v. NLRB*, 850 F.2d 524, 527 (9th Cir. 1988); *NLRB v. Overseas Motors, Inc.*, 818 F.2d 517, 521 (6th Cir. 1987); *NLRB v. Laredo Packing Co.*, 730 F.2d 405, 407 (5th Cir. 1984) (per curiam).

B. *Interim Earnings*

Plaintiffs concede that the interim earnings of the plaintiff class are proper setoffs. Dk. No. 572 at 29 n.5 (citing *Alfred M. Lewis, Inc. v. NLRB*, 681 F.2d 1154 (9th Cir. 1982); *NLRB v. Pilot Freight Carriers,- Inc.*, 604 F.2d 375 (5th Cir. 1979)).

C. *Severance Benefits*

Plaintiffs also concede that severance payments made by Morrell are proper setoffs against the damage award. Dk. No. 572 at 29 n.5 (citing *Fariss v. Lynchburg Foundry*, 769 F.2d 958 (4th Cir. 1985); *EEOC v. Sandia Corp.*, 639 F.2d 600 (10th Cir. 1980)).

D. *Union Dues*

The Union asserts, without citing any authority, that union dues which normally would have been deducted

from the plaintiffs' paychecks pursuant to the 1979 Master Agreement should be deducted from the backpay award. Unless the Union provides the court with some authority for this position, the court will not allow union dues to be a setoff. The jury found a breach of the Union's duty for which dues are paid. The Union should not be rewarded by a setoff of dues from the damages caused by its own wrongful conduct.

E. *Unemployment Compensation*

The decision whether to offset unemployment compensation is within the trial court's discretion. *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1555 (10th Cir. 1988); *EEOC v. Sandia Corp.*, 639 F.2d 600, 624-26 (10th Cir. 1980). Unemployment compensation is a collateral source which is traditionally not deducted from a backpay award, primarily because it is unfair to give the defendant the benefit of it. *Cooper*, 836 F.2d at 1555; *Sandia Corp.*, 639 F.2d at 625.

Unemployment compensation benefits are awarded by the state in furtherance of a separate social policy. *Sandia Corp.*, 639 F.2d at 624; *see* K.S.A. 44-702 (policy of state). This reasoning applies even though the payments made by the state are funded by taxes paid by employers. *See NLRB v. Gullett Gin Co.*, 340 U.S. 361, 364 (1951). In the exercise of its discretion, the court finds that the Union should not benefit from the unemployment compensation received by members of the plaintiff class, especially since that compensation was funded by Morrell. Unemployment compensation shall not be an offset.

F. *Disability Benefits (Workers Compensation)*

Plaintiffs rely on *Whatley v. Skaggs Cos.*, 707 F.2d 1129, 1138-39 (10th Cir.), *cert. denied*, 464 U.S. 938 (1983), a Title VII suit, for the proposition that disability benefits are not a proper offset against a backpay award.

The NLRB, however, has long held that disability benefits may be an offset in certain situations. *See American Mfg. Co.*, 167 N.L.R.B. 520 (1967).

The *American Manufacturing* decision has been cited in support of two separate propositions. First, an employer is not liable for backpay for periods during which an employee is unavailable for work due to a disability. In other words, backpay is tolled during the period of disability. *See NLRB v. Louton, Inc.*, 822 F.2d 412, 415 (3d Cir. 1987) (citing *Canova v. NLRB*, 708 F.2d 1498 (9th Cir. 1983); *American Mfg. Co.*, 167 N.L.R.B. 520 (1967)). Second, workers compensation benefits which represent compensation for lost wages may be deducted from a backpay award. Workers compensation benefits which represent reparation for permanent physical injury are not deductible. *See Canova v. NLRB*, 708 F.2d 1498, 1504 (9th Cir. 1983) (citing *American Mfg. Co.*, 167 N.L.R.B. 520 (1967)).

The Union urges the court to adopt both of these positions and order that backpay be tolled during the time when a plaintiff was under a disability and further order that any workers compensation benefits received be deducted from that plaintiff's backpay award. If the court were to adopt this approach, the plaintiffs would be penalized and the Union would receive a double benefit from the same event: the court would award no backpay for the period of time a plaintiff was disabled and, at the same time, order that workers compensation benefits actually received be used as an offset against the (nonexistent) backpay award. The court declines to adopt this approach.

The court will select the second approach outlined above. Backpay will continue to accrue during the period in which any plaintiff was disabled; however, any workers compensation award (or portion thereof) which was intended as compensation for lost wages shall be deducted.

Any workers compensation award (or portion thereof) which was intended as reparation for permanent physical injury shall not be deducted from the backpay award. The Union has not addressed the purpose behind workers compensation awards under the Kansas statutory scheme. *See, e.g., Canova,* 708 F.2d 1504 (discussing the distinction between permanent and temporary disability payments under California law). Unless the Union establishes that any plaintiff actually received workers compensation benefits which were designed as compensation for lost wages, as opposed to reparation for permanent injury, no setoffs for workers compensation benefits will be allowed.

G. *Mitigation of Damages*

A backpay claimant has a duty to mitigate his damages. A claimant's failure to search for alternative work, his refusal to accept substantially equivalent employment, or his voluntary quitting of alternative employment without good cause constitute affirmative defenses to backpay liabilty. *NLRB v. Laredo Packing Co.,* 730 F.2d 405, 407 (5th Cir. 1984) (per curiam). A claimant is not required, however, to accept anything other than suitable interim employment. *Id.* at 408. The reasonableness of a claimant's efforts to secure substantially equivalent employment is determined by, *inter alia,* the economic climate and the worker's skill, qualifications, age, and personal limitations. *Lundy Packing Co. v. NLRB,* 856 F.2d 627, 629 (4th Cir. 1988).

The Union cites *Universal Security Instruments, Inc. v. NLRB,* 649 F.2d 247 (4th Cir.), *cert. denied,* 454 U.S. 965 (1981) for the proposition that when an employee rejects an opportunity to transfer to another location upon a plant closing, no backpay liability occurs. In the present case, many of the plaintiffs were given the opportunity to transfer to another Morrell plant in lieu of severance. Apparently, few accepted the transfer option. If the court

accepted the Union's position, few, if any, members of the plaintiff class would be entitled to backpay.

Universal Security Instruments does not stand for the proposition the Union asserts. Instead, the Fourth Circuit held that, because the employer did not discriminate against the employees, no backpay could be awarded. 649 F.2d at 261. The court rejects the proposition that the plaintiffs gave up their right to backpay by accepting severance instead of transfer. Morrell breached the contract at Arkansas City. The plaintiffs should not have to accept jobs at a faraway plant of the instigator of the breach.

The Union acknowledges that it bears the burden of proving that the plaintiffs failed to mitigate their damages. Dk. No. 583 at 75. The Union asserts that it is entitled either to depose each member of the plaintiff class or to call each plaintiff as a witness in the damage trial. The Union cites the advisory committee's note to Rule 23 of the Federal Rules of Civil Procedure:

> Subdivision (c)(4) This provision recognizes that an action may be maintained as a class action as to particular issues only. For example, in a fraud or similar case the action may retain its "class" character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.

Fed. R. Civ. P. 23 advisory committee's note. This note does not support the Union's position. First, this is not a fraud action. Second, the note does not state that each plaintiff must be examined as a trial witness or deponent in order to prove his claim. If the Union wishes the court to consider the NLRB cases which it cites in its brief (Dk. No. 583 at 77 n.64) the Union shall provide the court with copies of these (and any other pertinent) cases.

If the Union provides support for its proposition that individual hearings are required for each plaintiff, the court would have to appoint a special master to conduct these proceedings with the 641 plaintiffs, with the attendant costs to be taxed to the Union. *See* Fed. R. Civ. P. 53(a).

H. *Settlement with Morrell*

Although not addressed by the parties, the court believes that the amount of Morrell's settlement with the plaintiff class should be deducted from the total amount of back-pay and related damages. *See Peterson v. Air Line Pilots Ass'n*, 622 F. Supp. 232, 237 (M.D.N.C. 1985).

V. CONCLUSION

In this opinion, the court has set out many of the legal principles and preliminary rulings which shall govern the further course of this action. Matters which have not yet been finally resolved shall await further briefing or trial. The court shall hold a pretrial conference at a later date.

IT IS BY THE COURT THEREFORE ORDERED that the findings herein on the damage issues shall be the order of the court.

IT IS SO ORDERED.

At Wichita, Kansas, this 12th day of July, 1989.

s Frank G. Theis
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. 83-1858-T

STEPHEN T. AGUINAGA, WAYNE PAPPAN, and JANET BROWN, Individually and on behalf of all other union members similarly situated,

Plaintiffs,

v.

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO CLC,

Defendant.

MEMORANDUM AND ORDER

[Filed April 16, 1990]

This matter is before the court on plaintiffs' motion for a trial setting (Doc. 609), the defendant's response thereto (Doc. 611), the plaintiffs' motion for pretrial conference and trial setting on damages (Doc. 612), the defendant's response thereto (Doc. 614), and the defendant's motion for scheduling conference (Doc. 613). This case was bifurcated: a jury has previously returned a verdict in favor of the plaintiff class on the liability issues. This case is now before the court for a determination of damages. The court anticipates that this matter can be concluded with little or no trial time, based primarily on the documentary evidence previously made available to the defendant. The court issues this order to resolve several outstanding matters.

I. Damages

The court has previously relied on cases from the National Labor Relations Board ("NLRB") in ruling on the damage issues presented in this case. However, this hybrid § 301 action significantly differs from NLRB proceedings. The primary distinction is that in the present case, a jury has reached a decision on the liability issues. This court is bound to follow the jury's determination in reaching its conclusions on the damage issues. The court is not free to relitigate issues which were presented to and decided by the jury.

During the liability phase of the trial, the defendant presented evidence of the economic conditions in the meatpacking industry during the relevant times. The defendant attempted to show that plaintiffs' employer, John Morrell & Company ("Morrell"), would have reduced production and decreased the workforce for legitimate economic reasons. The jury rejected the defendant's theory, finding that Morrell's actions in closing the meatpacking plant were not taken for legitimate business or economic reasons but were taken to avoid the provisions of the collective bargaining agreement. The defendant now wishes to present evidence that, in the absence of Morrell's breach of the collective bargaining agreement: Morrell would have decreased production, fewer employees would have been employed, the wage rate would have been cut, and the plant would not have remained open for as long as the court has proposed awarding damages. The defendant cannot now relitigate the issues which have already been decided by the jury. As for the remaining issues, the court is adopting as a matter of law the rulings contained in the July 12, 1989 opinion and order. The court will not hear evidence on the matters which defendant proposes. Thus, damages will be awarded to the entire plaintiff class, from the closing of the plant through September 1, 1983, at the Master Agreement rate, based on the average number of hours the plaintiffs worked prior to closure.

The court adheres to its earlier rulings on benefits. The parties will need to address the specific amounts due the plaintiff class as benefits by briefs and submission of documentary evidence.

II. Setoffs

The court will require individualized showings of interim earnings by the members of the plaintiff class. The plaintiffs have previously provided the defendant with certain damage information. Tax records (tax returns and/or W-2 forms) will suffice for proof of interim earnings. Additionally, where no tax information exists, interim earnings during the damage period will be established by affidavits of the plaintiff class members. The defendant may respond by counter-affidavits, if available. Since the defendant has provided the court with no authority to the contrary, the court will rely on tax information as credible proof. If there are any plaintiffs for which neither tax information nor affidavits are available, the court will make appropriate rulings as necessary.

The court will require individualized proof of severance benefits received from Morrell. In the case of any plaintiff whose reported severance benefits differ from Morrell's records of severance benefits paid to that plaintiff, the court will follow Morrell's records. The parties should be able to stipulate to the amounts paid based on Morrell's records.

The defendant seeks to cross-examine all members of the plaintiff class regarding their efforts in mitigation of damages. The NLRB apparently requires all backpay claimants to appear before the Administrative Law Judge and testify regarding their efforts to mitigate, *i.e.*, attempts to find alternative work. Unless a claimant appears and testifies, he or she cannot receive an award of backpay. The defendant urges the court to adopt this same rule. After thorough consideration, the court declines to adopt this rule. Such a rule would completely eliminate the advantages of the class action proceeding. The court will

rely on tax information and affidavits, which prove interim earnings, as proof of efforts at mitigation.

Based on the rulings the court has made herein, the damage issues should be easily resolved, probably without trial under summary judgment rules. The parties should be able to stipulate to the dollar amounts. In the absence of such a stipulation, the plaintiffs shall file, within thirty (30) days of this order, their damage computations supported by the appropriate exhibits, consistent with the rulings made in this order and the July 12, 1989 order. The defendant shall have twenty (20) days to respond. The response shall be limited to the matters contained in the plaintiffs' computations, with any alternative computations necessary to rebut the plaintiffs' computations. Plaintiffs shall have the standard five (5) day reply time. Upon receipt of these matters, the court shall issue the appropriate orders or set the matter for hearing, if necessary. Because of both judicial and attorney delay and because of the economic hardship on the class of plaintiffs, the court deems time of the essence in completing the trial court proceedings in this case.

IT IS BY THE COURT THEREFORE ORDERED that the plaintiffs file their damage computations consistent with this order within thirty (30) days. Defendant shall have twenty (20) days to respond.

At Wichita, Kansas, this 16th day of April, 1990.

s/ Frank G .Theis
FRANK G. THEIS
United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. 83-1858-T

STEPHEN T. AGUINAGA, WAYNE PAPPAN, and JANET BROWN, Individually and on behalf of all other union members similarly situated,

Plaintiffs,

v.

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO CLC,

Defendant.

MEMORANDUM AND ORDER

[Filed Oct. 9, 1990]

This matter is before the court for the purpose of entry of a damage award to the plaintiff class. The parties have filed their damage briefs and computations. Doc. 616, 622. The court does not believe oral argument or an evidentiary hearing is necessary at the present time. The court will rule, to the extent possible, on the basis of the briefs and computations on file. In their reply-brief, Doc. 627, plaintiffs have moved to strike the opinions, calculations, and affidavits of the Union's experts, since these experts were not listed in the pretrial order. Plaintiffs also object to the affidavits submitted by the Union's counsel's paralegals who are also not listed in the pretrial order. Defendant has filed a motion for leave to file a surreply on damages and for a damages hearing, Doc. 630. The court has considered the arguments in the sur-

reply, although the court has not granted the leave that it be filed. Plaintiffs have filed an objection to the Union's motion for leave to file a surreply and for damages hearing. The court has also considered the arguments made therein.

I. The Morrell Settlement

Plaintiffs did not deduct the amount of the Morrell settlement in their computations, arguing that the court should not use the Morrell settlement as an offset since the court is apportioning fault. Plaintiff compares the present case to a comparative fault case, where the nonsettling defendant is not allowed an offset for payments made by a settling defendant. Plaintiffs note that the parties never addressed this issue; the court raised the issue sua sponte in a prior damage order. Defendant merely argues that the court has already decided the issue in a previous damages order.

The court will not subtract the amount of the Morrell settlement as an offset since the court is applying comparative fault principles. Upon further consideration, the court believes its initial ruling was in error and that plaintiffs' position is correct under general principles of apportionment. Under comparative fault principles, the amount of a settlement received from one defendant is not subtracted from the judgment entered against a nonsettling defendant. *See Glenn v. Fleming*, 240 Kan. 724, 732 P.2d 750 (1987). Under comparative fault principles, an injured party may settle with any person whose fault may have contributed to the injuries without that settlement affecting the right to recover from another party. *Geier v. Wikel*, 4 Kan. App. 2d 188, 190 (1979). Upon settlement,

> [t]he injured party is entitled to keep the advantage of his or her bargaining, just as he or she must live with an inadequate settlement should the jury deter-

> mine larger damages or a larger proportion of fault than the injured party anticipated when the settlement was reached.

Id.

Under the principles of law applicable to compensate the plaintiff class for its loss and make it whole, the total gross damages against both the employer and the union would have been some twenty million dollars. Of this amount, the employer, Morrell, would have had to pay some fifteen million dollars (less 75% of the setoffs) absent its settlement with the plaintiff class. The union's share would have been some five million dollars (less 25% of the setoffs). The settlement sum paid by Morrell to the class was far less than the class would have received under the facts of the case had Morrell continued as a party. The union is not entitled to deduct the Morrell settlement amount from its 25% liability for the injury to the plaintiff class.

II. Lost Wages and Benefits

The purpose of an award of backpay (including fringe benefits) is to make employees whole for the losses suffered. *Bowen v. United States Postal Service*, 459 U.S. 212, 223 (1983); *NLRB v. Master Slack*, 773 F.2d 77, 83 (6th Cir. 1985). In unfair labor practice proceedings, the NLRB's task is to find a remedy that will restore the economic status quo that would have obtained but for the unfair labor practice. Remedies that award employees more than they would have received but for the violations are punitive and thus improper. *See NLRB v. Fort Vancouver Plywood Co.*, 604 F.2d 596, 602 (9th Cir. 1979), *cert. denied*, 445 U.S. 915 (1980); *see also Kallmann v. NLRB*, 640 F.2d 1094, 1103 (9th Cir. 1981); *NLRB v. J. S. Alberici Construction Co.*, 591 F.2d 463, 468, 470 n.8 (8th Cir. 1979). Thus, only one recovery is allowed, even if the employer and the union committed multiple breaches. The damage formula the court chooses must

give a close approximation of the amounts due. Damages need not be proven with exactitude, however. *NLRB v. Overseas Motors, Inc.*, 818 F.2d 517, 521 (6th Cir. 1987).

A. Gross Lost Wages

1. In General

Plaintiffs claim gross lost wages in the amount of $18,821,617.00, based on the court's previous rulings as to the number of plaintiffs (the entire class), the wage rate (the 1979 Master Agreement rate through September 1, 1982 and the 1982 Master Agreement rate through the remainder of the damage period), the hours per week (the average for each plaintiff in the eighteen months prior to closing), and the length of the damage period (from the closing of the plant to September 1, 1983). Lost wages include overtime at time and a half for all hours over 40 hours per week. Defendant concedes that plaintiffs' gross lost wage computations are accurate given the assumptions employed. *See* Doc. 622 at 3. The court will use plaintiffs' figure of $18,821,617.00 for gross lost wages of the plaintiff class.

2. Overtime Vacation Pay

Defendant objects to the inclusion of overtime vacation pay for the period September 1, 1982 through September 1, 1983. Under the 1979-1982 Master Agreement, Morrell employees were paid for vacation time on the basis of their average hours worked per week, including time and a half for overtime. Under the 1982-1985 Master Agreement, vacation pay was based on 40 hours per week. Defendant asserts that a deduction of $202,861.45 must be made for the inclusion of overtime pay in the computation of vacation pay.

Plaintiffs respond that they did not include overtime in the vacation pay computation and that the Union in-

correctly assumed that they had. It appears to the court that the defendant made this deduction without determining whether overtime vacation pay was included in the gross wage computation. Overtime vacation pay was not included in the computation. *See* Doc. 628, Attachment 2, Exh. P-812, Affidavit of Gary Poore ¶ 2. No deduction shall be made for overtime vacation pay.

3. Mitigation

Defendants include a deduction for failure to mitigate within their gross wage calculation (*see* Doc. 622 at 6-14), although it is a setoff item and will be discussed below. Defendant's unstated purpose in this maneuver—placing mitigation within the gross damage category—is to put the burden on plaintiffs to show that they properly mitigated their damages by diligently searching for work. The burden is, however, on the defendant to show that plaintiffs failed to mitigate their damages. *See infra* § III (B).

B. Lost Health and Medical Benefits

1. Sioux Falls Alternative

Plaintiffs claim lost health benefits in the amount of $1,092,770 based on the average cost to Morrell per worker for providing health benefits to its Sioux Falls workers. Defendant correctly points out that the court has previously rejected this method of computing lost health and medical benefits.

2. Out of Pocket Alternative

Plaintiffs claim out of pocket losses of $249,100. The court previously chose this measure of lost health benefits. This is also the method with case law support. Plaintiffs may be compensated for the loss of their medical benefits if plaintiffs have purchased substitute insurance coverage or have incurred out of pocket, uninsured medi-

cal expenses which would have been reimbursed under the employer's plan. *See Galindo v. Stoody*, 793 F.2d 1502, 1517 (9th Cir. 1986) (citing *Foust v. International Bhd. of Elec. Workers*, 572 F.2d 710, 718 & n.1a (10th Cir. 1978), *rev'd in part on other grounds*, 442 U.S. 42 (1979)).

Defendant asserts that there are errors in plaintiffs' calculations of out of pocket loss, including claims for items which were not covered by Morrell's health benefits and duplicate claims. Defendant also proposes a formula for determining the amount of the major medical deductible. The major medical deductible was $300 over a 24 month period. With a damage period of 14 months, defendant computed the major medical deductible for the damage period to be 14 24 of $300 or $175. Defendant took 20% of $175, on the assumption that 20% of health claims would be major medical claims. Therefore, defendant took a deduction of $35 from each plaintiffs' claimed health loss as the major medical deduction. Eliminating double counting, noncovered expenses, unsubstantiated expenses, untimely expenses, and expenses reimbursed by substitute insurance, defendant calculates plaintiffs' lost health benefits to total $101,721.

A backpay plaintiff is entitled to recover medical insurance premiums and unreimbursed medical expenses which would have been reimbursable under the employer's plan. The plaintiff cannot recover the average amount the employer spent on insurance coverage when the plaintiff did not obtain insurance or incur out of pocket expenses which would have been compensable under the plan. *Berndt v. Kaiser Aluminum & Chemical Sales, Inc.*, 604 F. Supp. 962 (E.D. Pa. 1985). The plaintiff is entitled only to out of pocket expenses incurred for other insurance and or actual medical expenses. *Id.*

To the extent that plaintiffs have claimed items which would not have been covered under the Morrell plan,

which were reimbursed by other insurance, which were claimed more than once, or which were otherwise non-compensable, they will be disallowed. The parties are directed to consult with each other to reach an agreement on the appropriate amount of the lost health benefits. If the parties cannot agree, the court will take whatever action is appropriate, including appointing an expert accountant, with costs to be taxed pursuant to 28 U.S.C. § 1920(6).

C. Lost Pension Benefits

Plaintiffs initially claimed lost pension benefits in the amount of $668,506. Plaintiffs later amended this to claim $978,087, stating that their expert's initial calculations were in error. According to plaintiffs' expert, his original calculation of benefit values was commenced not on September 1, 1983 and projected forward, but was commenced in May 1990 (when he did his calculations).

Plaintiffs' claim for lost pension benefits is based on the present value of the future stream of payments that would have resulted had each individual continued working until September 1, 1983, less the present value of the future stream of payments earned by each individual as of June 19, 1982 (the date the plant closed). If a worker would not have attained ten years of service by September 1, 1983, he would not have vested in the pension plan and his pension losses are zero. Plaintiffs assumed that no class member would have retired during the damage period.

Defendant purposes that the proper measure of damages for lost pension benefits is the Morrell contribution of 20 cents per hour, less any replacement benefits the plaintiffs received. Defendant concludes that the lost pension benefit award should be $269,903.80. Defendant's pension expert has submitted his opinion on plaintiffs' amended pension claim. Doc. 626.

The plaintiffs' expert applied a discount rate of 8% derived from the Unisex Mortality Table of the Pension Benefit Guaranty Corporation. Defendant's expert did not specify any particular discount rate as the appropriate rate to use, but did rely on Pension Benefit Guaranty Corporation male life annuity rates. The unisex table is a more appropriate basis for computation of lost pension benefits since the class consists of both men and women. The court sees no inconsistency with using an 8% discount rate and a 10% prejudgment interest rate. The court previously ordered that the plantiffs' damage award would include prejudgment interest. The 10% prejudgment interest rate is set by statute, KSA 16-201.

Defendant argues that plaintiffs should have assumed that a certain number of people would have retired during the damage period. According to defendant, a certain percentage of people would have retired as soon as they became eligible. Plaintiffs respond that the court ordered damages to be awarded to the entire plaintiff class. Additionally, it appears that only one plaintiff [1] would have reached age 65 during the damage period.

Plaintiffs also argue that pension benefits available at new jobs should not be a setoff. Those new pension plans required the plaintiffs to start over; their years at Morrell did not contribute to their new plan and had no effect on vesting. Finally, plaintiffs point out that contrary to defendant's expert's opinion, they did set off the actual amount of pension benefits received—not from the computation of gross lost pension benefits, but as a setoff from gross lost wages.

In its response to plaintiffs' damage submission, defendant points out a couple of examples of what it considers to be grossly inflated claims for lost pensions. For example, plaintiff William Munley began work at the Cowley County Sheriff's office immediately after the Rodeo plant

[1] Velma G. Neal.

closed. Munley became a participant in the county pension plan. Plaintiffs value his pension losses at $41,257. Plaintiff Kenneth E. Bryant began to work at Ark City Packing Company (Morrell's reopened facility) on February 1, 1983 and reentered Morrell's pension plan at that time. Plaintiffs value his pension losses at $37,169. Defendant fails to note that these plaintiffs would have reached their 30 year anniversary with Morrell if they had continued to work through the damage period. As of the 30 year date, the vested value of an employee's pension increases. Pursuant to the 1979 Supplemental Agreement on Pensions, Exh. P-3, Article III(B) (*see* Exh. P-806), once an employee completes 30 years of employment, he is eligible to receive both the normal retirement pension plus a monthly supplement of $100.

When an employee is ordered reinstated, the court may add to the award the contributions the employer would have made to the pension fund. The award will consist of payments to the pension fund on the plaintiff's behalf to bring the plaintiff's pension interest up to the level it would have been absent the discrimination. *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1021 (1st Cir. 1979) (Age Discrimination in Employment Act). When reinstatement is not ordered, pension damages should approximate the present discounted value of the plaintiff's interest. The award should be computed as if the plaintiff had been employed until the date the damages are settled. *Id.* Pension rights are proper elements of damage and their present value is recoverable based on expert testimony. *Kelly v. American Standard, Inc.*, 640 F.2d 974, 986 n. 20 (9th Cir. 1981) (Age Discrimination in Employment Act).

Plaintiffs are entitled to receive a lump sum representing the discounted present value of the difference between what they are now entitled to receive under Morrell's pension plan and what they would have been entitled to receive had they remained employed through the end of the damage period. Since defendant has not provided the

court with any computations applying the relevant legal standard, the court shall award lost pension benefits based on plaintiffs' computations.

A pension award is allowed unless the record reflects that plaintiffs secured equivalent pension benefits with interim employers. *Smyth Mfg. Co.*, 277 N.L.R.B. 680, 683 n. 12 (1985). The burden must be placed on the defendant to show equivalency of new pension benefits, as this is in the nature of a setoff. Defendant has not met its burden. Defendant argues that some 280 plaintiffs replaced their Morrell pension benefits during the damage period. *See* Exh. U-2409. Defendant merely lists the names of plaintiffs who were employed in a job offering a pension plan and the dates of such employment. Defendant has failed to come forward with any evidence demonstrating that the replacement pension plans were the equivalent of Morrell's plan. Thus, no setoff will be made for replacement pension benefits.

III. Setoffs

The burden is on the plaintiffs to prove the gross amounts of backpay and related damages due each of them. The burden then shifts to the defendant to demonstrate any reductions in the amount of backpay or any facts which would mitigate its liability. *Lundy Packing Co. v. NLRB*, 856 F.2d 627, 629 (4th Cir. 1988); *Kawasaki Motors Mfg. Corp., U.S.A. v. NLRB*, 850 F.2d 524, 527 (9th Cir. 1988); *NLRB v. Overseas Motors, Inc.*, 818 F.2d 517, 521 (6th Cir. 1987); *NLRB v. Laredo Packing Co.*, 730 F.2d 405, 407 (5th Cir. 1984) (per curiam). Plaintiffs have previously conceded that the interim earnings of the plaintiff class and severance payments made by Morrell are proper setoffs against the damage award. *See* Doc. 572 at 29 n.5.

A. Severance Pay

Plaintiffs have taken a setoff of $2,450,247 for severance pay. Exh. P-807, 1982 setoffs. Defendant asserts

that the severance pay setoff should be $2,481,955. Supplemental Exh. U-2414, Affidavit of Susan Mackie, Exh. A. Both plaintiffs and defendant assert that they took their figures from Morrell's records. From the court's review of Exhibit U-2415, it appears that defendant disputes the severance amounts for only nine plaintiffs.[2] Since both sides apparently took their severance pay figures from Morrell's records, there should be no discrepancy. The parties are directed to consult with each other to reach an agreement on the appropriate amount of the severance pay setoff. If the parties cannot agree, the court will take whatever action is appropriate, including appointing an expert accountant, with costs to be taxed pursuant to 28 U.S.C. § 1920(6).

B. Mitigation

A backpay claimant has a duty to mitigate his damages. A claimant's failure to search for alternative work, his refusal to accept substantially equivalent employment, or his voluntary quitting of alternative employment without good cause constitute affirmative defenses to backpay liability. *NLRB v. Laredo Packing Co.*, 730 F.2d 405, 407 (5th Cir. 1984) (per curiam). A claimant is not required, however, to accept anything other than suitable interim employment. *Id.* at 408. The reasonableness of a claimant's efforts to secure substantially equivalent employment is determined by, inter alia, the economic climate and the worker's skill, qualifications, age, and personal limitations. *Lundy Packing Co. v. NLRB*, 856 F.2d 627, 629 (4th Cir. 1988). The Union has previously acknowledged that it bears the burden of proving that the plaintiffs failed to mitigate their damages. Doc. 583 at 75.

The burden is on the defendant to show: (1) that there were suitable jobs available which the plaintiffs could have discovered and for which they were qualified and

[2] Those plaintiffs are Raymond B. Anderson, Charles E. Bell, James Blatchford, John D. Crumley, Jerry D. Ferril, Fred Hoock, Kenton O. Kendrick, Dwayna L. Lolar, and Charles L. Moore.

(2) that the plaintiffs failed to use reasonable diligence is [sic] seeking such positions. *See EEOC v. Sandia Corp.*, 639 F.2d 600, 627 (10th Cir. 1980). Defendant has failed to address the former issue. The defendant has, therefore, failed to carry its burden of proof. The court rules as a matter of law that the plaintiffs have mitigated their damages.

Defendant has proposed a mathematical formula for determining whether each plaintiff has properly mitigated his damages by searching for work. Defendant concludes that a setoff of $6,881,807.55 must be made for the plaintiffs' failure to mitigate. Defendant's formula requires a plaintiff to conduct two job searches per month, for an average of one search every eleven working days. Any plaintiff who did not list a sufficient number of job searches on his damage questionnaire is held by defendant to have failed to properly mitigate. The court must reject the defendant's formula. The burden is not placed on the employee to prove a "systematic method of searching for a job." *NLRB v. Westin Hotel*, 758 F.2d 1126, 1130 (6th Cir. 1985).

Plaintiffs make several arguments, including asking the court to take judicial notice of the economic conditions in Cowley County during the relevant time period. The court need not consider plaintiffs' arguments, however, since defendant has failed in its burden to show that there existed jobs for the 641 plaintiffs.

Plaintiffs also argue that the fact that at least 552 of the plaintiffs received unemployment compensation—which requires that the person register for work, report to the employment office, and be available for work—is prima facie evidence that plaintiffs have mitigated. The court agrees with plaintiffs on this point. If the plaintiffs received unemployment compensation but did not register for work or search for work as required, they would have been defrauding the government. No offset will be taken for the failure to mitigate damages.

C. Vacation Pay

Plaintiffs have taken a setoff for 1983 vacation pay, using the figures contained in Morrell's severance report. Plaintiffs argue that 1982 vacation pay, for vacation earned in 1981 and not taken before the plant closed, should not be a setoff. Defendant argues that vacation pay received in a lump sum is a proper setoff.

Pursuant to the provisions of the 1979 Master Agreement, vacation was taken the year after it was earned. *See* Exh. P-1, Master Agreement, § 66(a) (after a continuous service record of one year an employee received one week of vacation with pay). Vacation for 1982 was earned in 1981. Plaintiffs were entitled to receive their vacations regardless of the plant closing. Those plaintiffs who had not yet taken their vacations prior to the plant closing were entitled to vacation pay. 1982 vacation pay was not a benefit received by the plaintiffs as a consequence of the plant closing. *See EEOC v. Sandia Corp.*, 639 F.2d 600, 626 (10th Cir. 1980) (vacation pay which compensated plaintiff for vacation time which had been earned under the employer's policy but which had not been used is not an offset). No offset shall be taken for the 1982 vacation pay.

An offset for 1983 vacation pay is proper. Pursuant to the Master Agreement, an employee separated because of a permanent closing was paid, for each full month between January and the month of separation, one-twelfth of the amount of vacation pay he would normally receive the following year. *Id.* § 75(d). Thus, each plaintiff received some five months of vacation pay (January-May 1982) as a consequence of the plant closing. Vacation pay for 1983 was a benefit received as a consequence of the plant closing and is a proper offset.

D. Pension Income

Plaintiffs have taken a setoff for the pension income of those plaintiffs who opted for early retirement when the plant closed. There appears to be no dispute regarding the amount.

E. Interim Earnings

Plaintiffs calculated the interim earnings setoff from the plaintiffs' W-2 forms and tax returns. Those plaintiffs who did not have documentation submitted affidavits concerning their interim earnings. Plaintiffs assumed that income was earned at an even rate throughout the year, so that January 1-September 1, 1983 income was eight-twelfths of the total income reported. Defendant's calculation of interim earnings does not appear to differ; however, defendant has added the additional setoff category of "other income" which will be addressed below.

F. Workers' Compensation

The court has previously ruled that workers' compensation is a setoff to the extent the award is considered replacement for lost wages, as opposed to recompense for injury. The Union has submitted no evidence on this point. *See* Doc. 662 at 20 n. 22. No setoff will be made for this item.

G. Other Income

Defendant sets off as "other income" any wage income reflected on tax returns over and above the amounts shown in the available W-2 forms. This offset totals $338,806 for 1982 and $276,271 for 1983. Affidavit of Susan Mackie, Supplemental Exh. U-2414, ¶ 8. Defendant's computations fail to take into account the earnings of spouses and wages earned prior to the plant closing. Wages earned by a plaintiff's spouse and wages earned by a plaintiff at Rodeo prior to closing are not proper setoffs. The court cannot, therefore, follow defendant's calculations on this subject. No setoff will be made for "other income."

IV. Net Damages and Apportionment

The court has previously ruled that 25% of the damages shall be apportioned to the defendant.

V. Prejudgment Interest

Plaintiffs and defendant apply the statutory prejudgment interest rate of 10% from September 1, 1983.

VI. Attorney Fees and Expenses

Plaintiffs will submit their request for attorneys fees and expenses after judgment is entered. Plaintiffs assert entitlement to fees under the "common benefit" exception to the American Rule.

Defendant will challenge any award of attorney fees and expenses at that time. Defendant does not believe that attorneys fees are allowable in this matter.

VII. Summary

The parties have fifteen days to confer on the remaining disputed damage areas. The court shall set this matter for status conference at the end of fifteen days.

The court would remind counsel for the parties that while they have been adversaries, they should be mindful that the class before the court has affinity with both sides of the dispute. Counsel have an obligation to expedite resolution of this aged litigation for the benefit of the individual members of the plaintiff class.

IT IS BY THE COURT THEREFORE ORDERED that within fifteen (15) days from the date of this order, the parties shall confer and inform the court whether they have reached an agreement on the disputed damage calculations. The court shall hold a status conference on October 26, 1990, at 2:30 o'clock p.m.

At Wichita, Kansas, this 9th day of October, 1990.

/s/ Frank G. Theis
FRANK G. THEIS
United States District Judge

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. 83-1858-T

STEPHEN T. AGUINAGA, WAYNE PAPPAN, and JANET BROWN, Individually and on behalf of all other union members similarly situated,
Plaintiffs,

v.

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO CLC,
Defendant.

JOURNAL ENTRY OF JUDGMENT

[Filed March 28, 1991]

This matter is before the court for the purpose of the entry of judgment in favor of the plaintiff class and against the defendant United Food and Commercial Workers International Union, AFL-CIO CLC. Based on the court's previous damage orders and the parties' stipulations regarding certain disputed damage computations which are incorporated herein by reference, the Clerk is directed to enter judgment in favor of the plaintiff class and against defendant United Food and Commercial Workers International Union, AFL-CIO CLC as follows:

Total Gross Damages of the Plaintiff Class

Lost Wages	$18,821,617	
Lost Health Benefits	175,000	
Lost Pension Benefits	978,087	
	$19,974,704	$19,974,704

Less Setoffs for Severance and Interim Earnings	(9,202,654)
Net Damages Before Apportionment	10,772,050
Less 75% Apportioned to John Morrell & Co.	(8,079,038)
Net Class Damages	2,693,012
Prejudgment Interest from 9/1/83 to 3/26/91	2,037,857
TOTAL DAMAGES AND PREJUDGMENT INTEREST	$4,730,869

Considering the International Union to be 25% at fault, judgment shall be entered in favor of the Plaintiff class and against the International Union in the amount of $4,730,869.

IT IS FURTHER ORDERED that plaintiffs submit their request for attorneys' fees and expenses, supported by appropriate documentation, within thirty (30) from the date of this order.

IT IS FURTHER ORDERED that defendant's motion to vacate jury verdict and dismiss or alternatively for summary judgment (Doc. 653) is hereby denied.

At Wichita, Kansas, this 20th day of March, 1991.

s/ Frank G. Theis
FRANK G. THEIS
United States District Judge

APPENDIX I

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

Case Number 83-1858-T

STEPHEN T. AGUINAGA, WAYNE PAPPAN, and JANET BROWN, individually and on behalf of all other Union members similarly situated, *Plaintiffs,*

v.

JOHN MORRELL & CO.; UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO; and LOCAL UNION 340 UNITED FOOD AND COMMERCIAL WORKERS, *Defendants.*

JUDGMENT IN A CIVIL CASE

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment shall be entered in favor of the Plaintiff class and against Defendant United Food and Commercial Workers International Union, AFL-CIO as follows:

Total Gross Damages consisting of Lost Wages ($18,821,617), Lost Health ($175,000) and Lost Pension ($978,087)	$19,974,704
Less Setoffs for Severance and Interim Earnings	(9,202,654)
Net Damages Before Apportionment	10,772,050
Less 75% apportioned to Morrell	(8,079,038)
Net Class Damages before Prejudgment Interest	2,693,012
Prejudgment Interest (9/1/83 to and including 3/26/91)	2,037,857
TOTAL NET CLASS DAMAGES	$ 4,730,869

Considering the International Union to be 25% at fault, judgment is entered in favor of the Plaintiff class in the amount of $4,730,869.

ACCEPTED AS TO SUBSTANCE AND FORM:

s Frank G. Theis
FRANK G. THEIS
Senior Judge

Date Entered on the Docket

Date: 3-28-91

RALPH L. DE LOACH
Clerk

By s Anne Butler
ANNE BUTLER
Deputy Clerk

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

92-3091
92-3093

STEPHEN T. AGUINAGA; WAYNE PAPPAN; JANET BROWN, individually and in behalf of all Union Members similarly situated,

Plaintiffs-Appellants/ Cross-Appellees,

v.

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, UNITED FOOD AND COMMERCIAL WORKERS,

Defendants-Appellees/ Cross-Appellants.

ORDER

Entered July 16, 1993

Before, McKAY, Chief Judge, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, Circuit Judge.

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

ROBERT L. HOECKER
Clerk

By 's' Patrick Fisher
PATRICK FISHER
Chief Deputy Clerk

APPENDIX K

SUPREME COURT OF THE UNITED STATES

No. A-301

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION,
Petitioner

v.

STEPHEN T. AGUINAGA, *et al.*

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including November 15th, 1993.

/s/ Ruth Bader Ginsburg
RUTH BADER GINSBURG
Associate Justice of the Supreme Court of the United States

Dated this 1st day of October, 1993.

No. 93-769

Supreme Court, U.S.
FILED
DEC 27 1993
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO/CLC,
Petitioner,

v.

STEPHEN T. AGUINAGA, WAYNE PAPPAN and JANET BROWN, Individually and on behalf of all others similarly situated,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Jury in this case properly find, pursuant to unchallenged instructions, that it would have been futile for the plaintiff employees to have undertaken any further efforts to exhaust contractual grievance procedures, because of an agreement between the Union and the Employer to disregard the plaintiffs' rights under the Collective Bargaining Agreement.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-769

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO/CLC,
Petitioner,

v.

STEPHEN T. AGUINAGA, WAYNE PAPPAN and JANET BROWN, Individually and on behalf of all others similarly situated,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Despite the fact that petitioner deliberately has not presented the Court with the question whether the jury properly held that it breached its duty to fairly represent these plaintiffs, it devotes its statement of facts primarily to reciting the evidence that it presented below in an effort to show that respondents were represented fairly. Lest the Court get the wrong impression, we provide a bare outline of the duty of fair representation claim, before discussing the efforts that class members made to

obtain relief before suit and the treatment of the futility issue below.

A. The Original Agreement

In 1979, in the course of representing the plaintiffs, petitioner union and Morrell negotiated a "Master Agreement" to control the rights and obligations of employees at all Morrell-owned union facilities. It ran until September 1, 1982 and from year to year thereafter unless proper notice was given prior to July 1. This 1979 Master Agreement applied to the employees at an Arkansas City, Kansas meat packing plant operated by Morrell, which produced "Rodeo" brand meats (the "Rodeo Plant").

This agreement contained two important job protection provisions. One, Section 10, prevented Morrell from decreasing the work force to avoid the effect of the contract.[1] This provision prohibited Morrell from firing workers to avoid paying wages established in the contract and hiring non-union workers at lower wages to take their place. The other provision, Section 100(b), prevented contracting with others to provide services formerly provided by a closed plant.[2]

B. The Secret Deal Canceling the Original Agreement

As stated by both the trial and reviewing courts, and as found by the jury, the evidence at trial established that Morrell devised and implemented a surreptitious plan to close the Rodeo Plant and to reopen it later as a non-union plant. Pursuant to this plan, Morrell closed the Rodeo Plant in June 1982, represented that this closing

---

[1] Appendix to Petition for Certiorari ("Pet. App.") at 33a.

[2] *Id.* Before the Court of Appeals the Union did not challenge the finding that it breached its duty of fair representation with respect to the plaintiffs' claims arising out of Morrell's breach of Section 100(b).

was permanent, paid the plaintiffs severance benefits, and then reopened it in March 1983 as the Ark City Packing Company ("ACPC") at substantially reduced wages and benefits to the workers.[3]

The Rodeo Plant closed in June 1982, but by August 1982, the petitioner knew that this closing was nothing more than a "fraudulent move to destroy the Master Agreement contract, [and] defraud the workers * * *."[4]

The petitioner and Morrell reached an agreement in September 1982 in conjunction with negotiating the 1982 Master Agreement that would cover Morrell's open union plants. The new Master Agreement contained certain provisions that had absolutely nothing to do with the workers at these plants, but had a devastating effect on the plaintiffs.[5] Secret provisions of this new Master Agreement eliminated certain provisions of the old Master Agreement that restricted reopening closed plants, and what is more important, it excluded the plaintiffs from its scope—and did so without the plaintiffs ever having had a voice, in direct contravention of an established petitioner union policy.[6] In September 1982, at the conclusion of the Master Agreement negotiations, Morrell officials pressed petitioner's chief negotiator to allow it to reopen closed plants without facing any claim from the petitioner.[7] With this knowledge of Morrell's intention, the petitioner expressly excluded the plaintiffs from the new Master Agreement and agreed to Morrell's position.

Contemporaneous notes taken by Morrell representatives clearly establish the full and devastating impact of

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[3] Pet. App. at 33a-34a.

[4] Pet. App. at 9a; Transcript of 4-28-88 at 47, Appendix to Plaintiffs/Appellants' Brief on Appeal ("P. App.") at 487.

[5] Ex. P-165, P. App. at 295; Ex. P-166, P. App. at 296.

[6] *Id.*; Transcript of 5-16-88 at 19, 62-63, P. App. at 551, 554-55.

[7] Ex. P-220, P. App. at 327.

the secret agreements, which took the form of "side letters," entered into by petitioner union and Morrell on September 9 and 10, 1982. Petitioner agreed that Morrell could reopen the Rodeo Plant without that plant being covered by the 1982 Master Agreement.[8] The trial court found: "The language of the two letter agreements along with other direct and circumstantial evidence upon which the jury must have relied should have made the [petitioner] Union aware that Morrell had planned all along to reopen its closed plants." [9]

Moreover, in this secret bargain the petitioner agreed to go along with Morrell's breach of the plaintiffs' rights under the 1979 Master Agreement. Morrell's president testified:

> Q. As of the time the two letters had been signed * * * was it your understanding on behalf of Morrell that Morrell was free to reopen Ark City if it chose to and would not be in violation of the old or the new Master Agreement?
>
> A. Yes.
>
> Q. Was it your understanding that as of the time these two letters were signed, the union would not be able to sue Morrell for fraud upon reopening of the Ark City Plant?
>
> A. Yes, it was my understanding.[10]

This understanding was shared by Morrell's general counsel and a negotiator on behalf of Morrell.[11] These secret agreements constituted a complete sellout of the respondents for the sake of other workers at another plant.[12] The

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[8] *Id.*

[9] Pet. App. at 57a.

[10] P. App. at 508.

[11] P. App. at 497, 504-505.

[12] Transcript of 5-11-88 at 26-7, P. App. at 539-40; Ex. P-333BBB, P. App. at 350.

trial court acknowledged the effect of these letters on the plaintiff-respondent class, when it held:

> The two side letter agreements released all rights and claims the plaintiffs would have had against Morrell when the plant was reopened. Absent the side letter agreements, when Morrell reopened the Rodeo Meats plant, the plant would have been covered by the provisions of the Master Agreement. The plaintiffs would have been eligible for rehire at Master Agreement wages. The plaintiffs' rights were taken away by the execution of the side letter agreements.[13]

Making this clandestine bargain was so extraordinary, and represented such a clear departure from the proper role of any union, that the petitioner sought to keep any knowledge of this agreement from its own members. Lewie Anderson of the petitioner union conditioned signing the secret side letters only if "we [Morrell and the petitioner] agreed to keep it confidential and not spread it around the industry." [14]

The trial court held: "The [petitioner] Union concealed the existence of the side letter agreements, so that the plaintiffs did not know that their rights had been sacrificed. * * * The Union deceived the plaintiffs by concealing the side letters." [15]

The jury found that the petitioner breached the duty of fair representation that it owed to the respondents. The trial court in reviewing the jury's verdict, upheld that verdict, and characterized the petitioner's actions as "concealment," "deception" and "duplicity." [16] The trial court found "the evidence tended to show that the [petitioner], through [its Director of Packinghouse Division] Lewie Anderson, after finding out about Morrell's plan to re-

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[13] Pet. App. at 39a.

[14] Ex. P-173, P. App. 310-11.

[15] Pet. App. at 39a.

[16] Pet. App. at 39a, 41a.

open the Rodeo Plant as a low wage, non-union plant under the new name of Ark City Packing Company (ACPC) *purposely* let the matter drop." [17]

Consistent with the free ride the petitioner had promised Morrell as to the Rodeo Plant, Union officials intentionally ignored all evidence and all complaints voiced by class members that Morrell was breaching provisions of the 1979 Agreement.[18] The trial court held: "The Union acquiesced in Morrell's breach of contract." [19]

C. Petitioner's Pretense of Seeking Relief

In March 1983, the final phase of Morrell's plan occurred. It reopened the plant, completing its breach of Section 10 of the 1979 Master Agreement. Only then did the petitioner make even a feint of protecting the plaintiffs. After receiving much heat from the local union officials, petitioner filed an NLRB charge claiming that the plant's reopening involved unilateral changes of employment terms and conditions.[20] Filing the charge created an impression that the petitioner union was protecting the workers' interests. Petitioner informed the respondents that this charge would include any claims that might arise under the 1979 Master Agreement. The petitioner union informed them:

> If it is established that John Morrell & Company violated the Collective Bargaining Agreement, we will follow those provisions of the National Labor Relations Act. And, we will pursue through the National Labor Relations Board, any and all damages as a result of such violations.[21]

---

[17] District Court Docket No. ("Doc.") 602, P. App. at 148-49 (emphasis added).

[18] Doc. 602, P. App. at 148-49.

[19] Pet. App. at 39a.

[20] Ex. P-371, P. App. at 401.

[21] Ex. P-230, P. App. at 334.

Tom Aguinaga, one of three class representatives, testified that it was his understanding that the petitioner union would enforce the Master Agreement in its NLRB charge.[22] After all, that is precisely what the Union told the Local.[23]

Petitioner made the conscious decision to pursue the unfair labor practice charge and seek relief before the NLRB instead of pursuing the contractual grievance remedies. That decision was reached during discussions among staff attorneys and general counsel for petitioner union. Union's counsel decided that pursuing an unfair labor practice charge was better than invoking the contractual grievance procedures.[24]

As the trial court found after reviewing the evidence, "there was sufficient evidence for the jury to find that the [petitioner] Union lulled the plaintiffs into believing that it was pursuing their interests." [25] On July 25, 1983, the petitioner—without any notice to or discussion with the local union or the plaintiffs—requested the NLRB to approve withdrawal of its charge.[26] This withdrawal was the end of yet another secret bargain petitioner had struck with Morrell. In return for Morrell's agreeing to let it represent the workers of the reopened plant, petitioner union agreed to give up this attempt to enforce

---

[22] Transcript of 4-15-88 at 38, Appendix to Plaintiffs/Appellants' Reply Brief ("P. Supp. App.") at 214-15.

[23] It is a flat misstatement of the record to claim that the petitioner did not suggest that a grievance not be filed. That is clearly the message that was conveyed when the petitioner informed these workers that it would seek contractual remedies on their behalf under the National Labor Relations Act. (P. App. at 334.)

[24] Appendix to Appellee/Cross Appellant's Brief on Appeal ("D. App.") at 1127.

[25] Pet. App. at 43a.

[26] Ex. P-238, P. App. 337.

plaintiffs' rights under the 1979 agreement. These bargains again were struck without local union knowledge. On September 8, 1983, the NLRB approved withdrawal of the charge.[27] After learning of his final act that ended all pretense of petitioner attempting to enforce any of the contractual rights of the plaintiff-respondent class, the plaintiffs brought suit in September of 1983. At this point, filing a grievance would have been untimely.

D. Proceedings Below Concerning the Futility Issue

At the trial of this matter, the evidence of futility was so strong that the International Union did not seek a directed verdict on this question.[28] Indeed, the trial judge nearly decided not to submit the issue to the jury. Even after determining to submit the issue, he noted: "I don't believe the jury will have much trouble with that one saying it would have been a futile thing * * *." [29]

The Court instructed the jury without objection that failure to exhaust a contractual grievance procedure would be excused if, under the specific facts and circumstances, resort to that procedure would have been futile. In a specific interrogatory, the jury was asked, "Were the plaintiffs excused from exhausting their remedies with regard to Morrell's breach of Section 10 of the 1979 Master Agreement." The jury answered, "Yes." [30]

The trial court found sufficient evidence to support the futility finding:

> The evidence indicated that after Morrell closed the plant and paid the plaintiffs severance benefits,

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[27] Ex. P-238, P. App. at 337.

[28] In its Reply Brief below, the Union candidly admitted: "The UFCW presses one issue on appeal that was not directly raised on directed verdict: the exhaustion issue." (Reply Brief at 3.)

[29] Transcript of 6-2-88 at 158, P. Supp. App. at 236.

[30] Pet. App. at 46a.

> the Union claimed to no longer represent the plaintiffs. The two side letter agreements allowed Morrell to reopen the Rodeo Meats plant without the protections of the Master Agreement. Morrell then reopened the plant. *The Union chose to file an unfair labor practice charge instead of pursuing contractual remedies.* The Union voluntarily dropped the unfair labor practice charge after the National Labor Relations Board decided to issue a complaint. The decision to withdraw the charge was kept secret. The inference arose that the Union acquiesced in Morrell's actions to achieve status as the bargaining representative for the newly reopening plant. *The evidence was so strong that the court originally did not intend to submit the futility issue to the jury. However, out of an abundance of caution, the court did submit the questions.* The evidence was such that the jury could find that the Union was more interested in being recognized as the bargaining representative for the newly reopened plant than in continuing to represent the plaintiffs' interest. The evidence presented a jury question as to whether it would have been futile for the plaintiffs to attempt to exhaust remedies.[31]

The Tenth Circuit also rejected the Union's challenge. It held:

> Under the 1979 Master Agreement, an individual employee could initiate the grievance procedure, but the later stages of the grievance process required union participation. Although the local unions generally had primary responsibility for enforcing the 1979 Master Agreement, *the evidence supports a finding that in the case of Morrell's Section 10 breach, the [International] Union, not the Local, assumed control over the matter. Upon the reopening of ACPC, the Union reassured Plaintiffs that if Morrell had violated the 1979 Master Agreement, the Union, not the Local, would seek to remedy the vio-*

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[31] Pet. App. at 40a-41a (emphasis added).

> *lation.* Therefore, in determining whether Plaintiffs are required to exhaust, the relevant inquiry is whether the Union, not the Local, breached its duty of fair representation. As set out *supra* part II.B. Plaintiffs successfully proved that the [International] Union breached its duty of fair representation by refusing to protect Plaintiffs' interests in the face of Morrell's Section 10 breach. Plaintiffs were therefore not required to exhaust; accordingly, the jury finding that Plaintiffs' failure to exhaust was excused is reasonable.[32]

REASONS FOR DENYING THE WRIT

I. THE PETITION WAS FILED UNTIMELY

The first reason for denying the writ is that the petitioner filed the petition too late. The court of appeals issued its decision on May 17, 1993. Although petitioner was granted an extension of time until Wednesday, June 16, to file a petition for rehearing, that petition was in fact not filed until Thursday, June 17. Unlike a brief, which under Rule 25, F.R. App. P., is deemed filed as of the date of mailing, a petition for rehearing is filed as of the date it is received by the clerk. We have lodged with the Clerk a copy of the docket sheet of the court of appeals showing that the petition for rehearing was not received, and therefore was not filed, until a day too late.

Pursuant to Rule 13.4, the time for seeking certiorari runs from the time a petition for rehearing is denied only if that petition was timely filed, otherwise, it runs from the date of the original decision. Because the petitioner did not timely file the petition for rehearing, the deadline for seeking certiorari was August 17, 1993. After that date, the Court lacked jurisdiction to grant certiorari. Thus, although on October 1, 1993, Justice Ginsburg granted an extension of time for filing the petition for writ of certiorari, ruling on an application that repre-

[32] Pet. App. at 12a-13a (emphasis added).

sented that rehearing had been timely sought, the Court actually lacked jurisdiction to grant certiorari at that time.[33] The order granting an extension does not operate to cure the lack of jurisdiction, and the petition remains untimely.

II. PETITIONER FAILED TO PRESERVE THE FUTILITY ISSUE FOR REVIEW IN THIS COURT

The petition asks the Court to decide the circumstances in which the futility exception may be applied to excuse compliance with the general rule that workers who pursue hybrid actions under the duty of fair representation and section 301 normally must exhaust contractual grievance remedies. Without any objection from petitioner, the question of whether the futility exception applied in this case was presented to the jury for its decision pursuant to a special interrogatory. It is not clear whether petitioner's claim here is that there was insufficient evidence of futility to support the jury's verdict, or that the legal standard under which the jury was instructed was incorrect. In either event, the petitioner did not preserve the issue for appellate review.

If the petitioner seeks to present a question about the proper standard for determining futility, that issue has not been preserved for review because petitioner never challenged the standard under which the jury was instructed on the issue of futility. The petitioner did not object to the instruction on futility, and did not argue that the court improperly instructed the jury on that issue before either the trial court[34] or the Court of Appeals. The petitioner cannot now challenge the instructions.[35]

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[33] Respondents did not receive the application until after it had been granted.

[34] *See* Pet. App. at 40a.

[35] Rule 51, F.R. Civ. P., provides: "No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating

If on the other hand, the point is simply that there was insufficient evidence of futility, it is settled law that in order to challenge a verdict as insufficient under the evidence, the appealing party must have sought a directed verdict on that issue. *Comcoa, Inc. v. NEC Telephones, Inc.*, 931 F.2d 655, 663 n.11 (10th Cir. 1991). *See also*, 5A Moore's Federal Practice, ¶ 50.05[1]. This requirement ensures that the non-moving party receives notice of any deficiency of proof and an opportunity to cure that proof before having judgment entered against that party for failure to show a certain fact. As stated by *Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 786 F.2d 1342, 1346 (9th Cir. 1986):

> If the moving party is then permitted to make a later attack on the evidence through a motion for judgment notwithstanding the verdict or on appeal, the opposing party may be prejudiced by having lost the opportunity to present additional evidence before the case was submitted to the jury.

In the present case, the Union admittedly did not seek a directed verdict on the question of exhaustion.[36] A timely motion for directed verdict on this issue would have permitted the plaintiffs an opportunity to flood the record with evidence bearing on this point. Because it failed to raise this issue in a directed verdict motion at the close of the plaintiffs' case, and at the close of all evidence, petitioner should not be heard to complain about the lack of evidence bearing on this issue.

In fact, the futility issue was not a contentious issue at the time of trial. Because it played at best a very minor part in the petitioner's defense, the trial court nearly did not send the issue to the jury—and when that court did,

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distinctly the matter objected to and the grounds of the objection." *See also*, 5A Moore's Federal Practice ¶ 51.04.

[36] The Union's Reply Brief below stated: "The UFCW presses one issue on appeal that was not directly raised on directed verdict: the exhaustion issue." (Reply Brief at 8.)

the trial judge observed that the jury would not have any problem in finding facts sufficient to find futility. The failure to press this issue timely is, in itself, a candid admission by the Union how little it thought of this defense at the trial court level and should prevent the Union from raising it at this point.

III. THERE ARE NO SUBSTANTIAL CONFLICTS IN THE LAW APPLIED BY THE FEDERAL COURTS ON THE FUTILITY ISSUE

Federal labor policy recognizes that in most instances, labor disputes are best resolved when grievance procedures established in collective bargaining agreements are employed. This Court has established that generally, some resort to the contractual grievance proceeding is a necessary predicate to asserting a breach of contract claim in federal court. *Republic Steel v. Maddox*, 379 U.S. 650 (1965). This important policy is fulfilled if the employee "afford[s] the union the opportunity to act on his behalf." *Id.* at 653.[37] The cases, such as *Carr v. Pacific Maritime Ass'n*, 904 F.2d 1313 (9th Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991), are concerned with insuring that the Union receive timely notice of the complaint and an opportunity to act on it. 904 F.2d at 1318, n.7.

This Court held in *Glover v. St. Louis San Francisco R. Co.*, 393 U.S. 324, 330 (1969) that resort to contractual remedies is not required in "the situation where the effort to proceed formally with contractual or administrative remedies would be wholly futile." *Glover* itself recognized that it would be wholly futile to consign an employee to a grievance and arbitration procedure "administered by the Union, by the company, or both, to

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[37] As the petitioner pointed out, the normal situation existed here, and the Union had "discretion to supervise the grievance machinery and to invoke arbitration, [and] the employer and the union contemplate[d] that each [would] endeavor to settle grievances short of arbitration." *Vaca v. Sipes*, 386 U.S. 171, 191 (1967).

pass on claims by the very employees whose rights they have been charged with neglecting and betraying." 393 U.S. at 330-331.

The federal law governing when exhaustion of contractual remedies is excused is established by this Court's decisions in *Vaca v. Sipes*, 386 U.S. 171 (1967); *Glover v. St. Louis San Francisco R. Co.*, 393 U.S. 324 (1969), and *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). The futility doctrine as framed in these cases forms the controlling law applied by all the courts that address this question. The circuits have applied this controlling law with a surprising degree of uniformity.

For example, in *Hendricks v. Edgewater Steel Co.*, 898 F.2d 385, 388-89 (3d Cir. 1990), the court cited *Vaca v. Sipes* for the proposition that "the employee may be excused from [the exhaustion] requirement where resorting to the grievance procedure would be futile, * * *." *Terwilliger v. Greyhound Lines, Inc.*, 882 F.2d 1033, 1039 (6th Cir. 1989), *cert. denied*, 495 U.S. 946 (1990), cited *Glover* for the exception that occurs "where the effort to proceed formally with contractual or administrative remedies would be wholly futile." *Amburgey v. Consolidation Coal Co.*, 923 F.2d 27, 29 (4th Cir. 1991), *Roman v. U.S. Postal Service*, 821 F.2d 382, 385 (7th Cir. 1987), and *Rabalais v. Dresser Industries, Inc.*, 566 F.2d 518 (5th Cir. 1978) cite both *Vaca v. Sipes* and *Glover* and recognize that these cases provide the governing standards on futility.[38]

All these cases recognize that the standard to be applied is essentially the same. In each case cited by the petitioner, the burden is placed upon the injured employee to prove that resort to contractual remedies would have been futile. The minor extent to which

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[38] *Durham v. Mason & Dixon Lines, Inc.*, 404 F.2d 864 (6th Cir. 1968), *cert. denied*, 394 U.S. 998 (1969), was decided before *Glover* and so cannot be a representation of how futility, as defined by *Glover*, is interpreted in the Sixth Circuit.

the circuit courts reframe this test represents no dispute among them as to what the applicable standards are—this Court's decisions have supplied them. The fact that there is absolutely no discourse or disagreement among the circuits as to the standards to apply clearly evidences the lack of any dispute among the circuits. Not one circuit case cited to establish this supposed conflict has criticized, distinguished, or even cited any other circuits' case cited by the Union. None of the cases hint at the existence of any conflict as to the applicable standards.

The truth told by the various cases cited by the petitioner is that determining when exhaustion of contractual remedies is futile is a factually intensive undertaking. Each case revolved around the facts unique to it. Given the factually intensive nature of this inquiry, it is important to note that in none of the cases cited by the Union has a jury entered a specific finding of futility.

IV. UNDER ANY CIRCUIT COURT'S INTERPRETATION OF *GLOVER*, THE ACTIONS BY THE UNION WOULD HAVE BEEN SUFFICIENT TO SUPPORT A FUTILITY FINDING

Not only is there no substantial split among the lower courts about the standards to be employed in applying the futility exception to the exhaustion requirement, but the law uniformly applied by the circuits also clearly supports the jury's verdict in this case, for several reasons. The gist of respondents' charge against petitioner-union and defendant John Morrell was that they negotiated a secret agreement canceling a previous collective bargaining agreement, under which respondents enjoyed important rights in the event of a plant closing, and substituted for it a separate agreement that gave respondents no rights, but guaranteed petitioner the right to represent (and therefore derive dues income from) the employees of a newly opened plant.

It would seem obvious that it would have been futile for respondent to pursue a grievance under the old agree-

ment. Had respondent done so, the employer would have simply advised the arbitrator that petitioner-union had already agreed to cancel respondents' rights under the old agreement and substitute the new agreement for it, and the outcome of the arbitration would have been a foregone conclusion.[39] A stronger case for futility is hard to imagine.

And, indeed, the courts of appeals routinely hold that futility exists under such circumstances. For example, in *Glover v. St. Louis San Francisco R. Co.*, 393 U.S. 324 (1969), the union and the employer were alleged to have been "acting in concert." If true, "insistence that petitioners exhaust the remedies administered by the union and the railroad would only serve to prolong the deprivation of rights to which these petitioners according to their allegations are justly and legally entitled." 393 U.S. at 331. This case, is indistinguishable from these pertinent aspects of *Glover*. Petitioner-Union was found to have affirmatively agreed with the employer to strip these respondents of their contractual rights. Holding that these class members should have applied first to the petitioner and their employer for redress of an injury that the petitioner and employer secretly agreed to inflict on them only would have served to prolong the deprivation of these class members' rights.

There simply is no conflict among the circuits that this situation makes resort to a contractual grievance procedure futile. *E.g., Geddes v. Chrysler Corp.*, 608 F.2d 261 (6th Cir. 1979) (fact question presented on futility when Union and employer had agreed to adverse contract meaning); *Battle v. Clark Equipment Co.*, 579 F.2d 1338 (7th Cir. 1978) (summary judgment for employer reversed on futility claim where employee attacked contractual amendment, which both Union and employer had approved); *Lusk v. Eastern Products Corp.*, 427 F.2d

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[39] In fact, that is precisely what happened when the petitioner pressed its NLRB charge. *See* Ex. U-1378, D. App. at 629-642.

705, 708 (4th Cir. 1970) (employee cannot be forced to arbitration proceeding between "the two parties charged by the employee with combining to defraud him.").

Nevertheless, respondents did make an effort to obtain relief from the union, and the outcome of those efforts simply confirms the finding that any further effort would have been futile, and that the class members did everything that reasonably could be done to assert the class members' contractual rights. When the plant reopened as ACPC, a local union official undertook to (1) gather information from class members; (2) advise class members to apply at the reopened plant; and (3) coordinate a response with the petitioner-union.[40] In fact the petitioner was "getting calls almost daily" from a local union official, and the petitioner was asking the local "to continue getting information about the picture on the scene about what was happening locally, about when they were hiring, who they were hiring, [and] what terms and conditions they were offering * * *."[41] Clearly, the federal policy requiring at least an attempt to exhaust administrative remedies has been met by showing "repeated complaints to company and Union officials." *Glover*, *infra* at 330-331.

Petitioner used this information supplied by class members first to actively contemplate pursuit of the contractual grievance procedure, and then to pursue an unfair labor practice charge. The petitioner's active consideration of pursuing this contractual breach through the grievance process is clearly evidence that class members had—at least informally—invoked that grievance system.

Petitioner's attorneys testified to their decision not to pursue a grievance. In fact, they arrived at a conclusion that "we would have been foolish to pursue an arbitration on something as big as this and think that we were going

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[40] D. App. at 1172-74.

[41] D. App. at 1424.

to get people back to work. That's why we filed the charges." Petitioner-Union concluded that through the unfair labor practice charge, the class members could obtain enforcement of all their contractual rights.[42]

Petitioner's attorneys discussed how best to redress the contractual wrong suffered by the plaintiffs. One attorney for the petitioner testified: "I think that we discussed whether or not what our best route was to go, whether or not we had rights under the contract that could be pursued by it through a grievance or under the National Labor Relations Act and determined that filing the charge was our better position." [43]

After petitioner's attorneys rejected the position that the Union should pursue the plaintiffs' contractual rights through a grievance procedure, and opted to pursue an unfair labor practice charge, petitioner informed the class members of its decision:

> This is to advise that we are investigating the reopening of the Arkansas City plant. If it is established that John Morrell & Company violated the Collective Bargaining Agreement, we will follow those provisions of the National Labor Relations Act. And, we will pursue through the National Labor Relations Board, any and all damages, as a result of such violations.[44]

Class members understood Petitioner-union's notice to indicate that the petitioner would enforce the Master Agreement before the NLRB, and that they had to do nothing further to obtain enforcement of this contract.[45]

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[42] P. Supp. App. at 218-219.

[43] P. Supp. App. at 242-43.

[44] P. App. at 334.

[45] P. Supp. App. at 214-15. Futility also has been found to excuse the filing of grievances by similarly situated claimants after the Union has rejected one claimant's grievance. *Schultz v. Owens-Illinois, Inc.*, 696 F.2d 505, 511-12 (7th Cir. 1982).

Petitioner's position before this Court is that these class members should have disregarded the petitioner's assurances that it was protecting their contractual rights, and should have filed and pressed a grievance. The record shows, however, that petitioner-union did not need any further action by the plaintiffs in order to pursue a grievance proceeding against Morrell—it considered such a grievance as an option. It would be the utmost in absurdity to hold that the plaintiffs were required to formally ask the petitioner-union to do something that the petitioner already had determined not to do and had informed the class it would not do.

In fact, although Union attorneys rejected the grievance process, other Union officials, including the Union's Director of the Packinghouse Division, under no circumstances would have allowed a class member to press a claim for a contractual breach. The Tenth Circuit stated the evidence that supported the liability finding:

> [I]n August 1982, the Union knew of Morrell's plan to reopen the Rodeo Plant as a nonunion plant. Morrell's plan constituted a breach of Section 10 of the 1979 Master Agreement, yet the Union took no steps to remedy the breach. Instead, the Union entered into the two side letters with Morrell releasing all rights and claims Plaintiffs would have had against Morrell when the plant reopened. The Union then deceived Plaintiffs by concealing the side letters. As a result, Plaintiffs did not know that their rights had been sacrificed. Lastly, in an effort to conceal its acquiescence in Morrell's breach of Section 10, the Union filed an unfair labor practice charge against Morrell. However, after the NLRB decided to issue a complaint, the Union withdrew the charge and kept the withdrawal secret.[46]

The evidence showed, and the jury found, that the Union had struck a deal with Morrell specifically to sacri-

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[46] Pet. App. at 9a-10a.

fice the plaintiffs' rights under the contract. Where the Union and the employer have already agreed to sacrifice the rights of an employee, as previously shown, there is no conflict among the circuits but that it is absolutely futile to require that the employee go through the motions of filing a formal grievance.

CONCLUSION

For the foregoing reasons, this Court should not grant the petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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No. 93-769

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO CLC,
Petitioner,

v.

STEPHEN T. AGUINAGA, WAYNE PAPPAN and JANET BROWN, individually and on behalf of all others similarly situated,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR THE PETITIONER

ARGUMENT

I. THERE ARE NO PROCEDURAL BARS TO REVIEW

In an approach that manifests a deeply felt need to pretermit consideration of the question presented here short of the merits, respondents begin their opposition brief by dredging up from the court of appeals phase of this case and from the district court phase two supposed procedural bars to review by this Court. Neither is of any substance as the court of appeals—which decided the question raised in the petition on the merits—recognized.

(a) Respondents assert that the petition for rehearing in the court of appeals was filed a day late, with the result that the *certiorari* petition is untimely. Brief in Opposition at 10-11. But, in point of fact, the rehearing petition in the court of appeals was timely filed and was treated by the court below as timely filed.

In response to a motion by petitioners, the court of appeals entered an order extending the time for filing for rehearing to and including June 16, 1993. To be certain of that order's import, on June 10, 1993, Kimberly Victor, a paralegal at Donovan, Leisure, Rogovin, Huge & Schiller, the law firm representing petitioner in the court below, spoke to Teresa Smith in the Clerk's Office of the Tenth Circuit, and was advised that the order required that the rehearing papers be deposited in the United States mails by June 16, with a proper certification of that action, and that the order did *not* require that these documents be in the court of appeals' hands as of June 16. There is no dispute that petitioners complied with the order in those terms.

Consistent with that June 10, 1993 confirmation of *its* order's meaning, the court of appeals treated the rehearing papers as timely filed and ruled on the request for rehearing and the suggestion for rehearing *en banc* on their merits. *See* Pet. App. at 100a-101a. It is, we submit, too plain for argument that the court of appeals'

reading of its own order extending a time limit is dispositive.

(b) Respondents maintain that the question presented in the *certiorari* petition is foreclosed because that question was not raised in a motion for directed verdict in the district court. Brief in Opposition at 12.[1] Respondents raised this procedural defense in the court of appeals. That court rejected "Plaintiffs' contention that the Union has waived its arguments on appeal because it failed to seek a directed verdict on the same grounds," Pet. App. at 8a, and ruled on the exhaustion issue on the merits.[2] The court below, stating that the critical consideration is whether "the trial court is aware of the mov-

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[1] Respondents also note that petitioner did not object to the district court's instruction to the jury on the "futility" issue. *Id.* at 11. However, the error below was not in the instructions; the error was that the case should never have gone to the jury because the evidence did not permit a determination that respondents were free to bypass the grievance-arbitration procedure. *See infra* at 3-10.

[2] In their brief to the court of appeals, respondents stated: "In [its] directed verdict motion, the Union made no argument whatsoever that it was entitled to judgment . . . based upon a failure to exhaust . . . . [T]he Union cannot now argue that there was insufficient evidence to submit these issues to the jury." Plaintiffs/Appellants' Reply Brief and Plaintiffs/Cross Appellees' Responsive Brief, at 6. The UFCW argued in response that it was not necessary to include the exhaustion issue in a motion for directed verdict because the issue "was raised at numerous junctures below and was ruled upon in each instance." Appellee/Cross Appellant's Reply Brief, at 3.

As the UFCW explained, the exhaustion issue first had been raised in a motion to dismiss, D. App. at 1-2, then in a motion for summary judgment, *id.* at 52-55, which was denied "without prejudice," *id.* at 56-58, then in a motion to vacate the jury verdict and to dismiss on jurisdictional grounds, or alternatively for summary judgment, *id.* at 264-266, and finally in a motion for judgment notwithstanding the verdict, or in the alternative, for a new trial, *id.* at 267-269. In ruling on the JNOV motion the district court addressed the merits of the UFCW's exhaustion argument. Pet. App. at 40a-41a. It therefore is evident that the district court —like the court of appeals—rejected respondents' position that the exhaustion issue had not been preserved.

ant's position," held that the question presented here had been adequately raised and preserved. Pet. App. at 8a. Respondents do not provide any basis for concluding that the court of appeals erred in this regard.

II. THE QUESTION PRESENTED WARRANTS REVIEW BY THIS COURT, AND THIS CASE PROVIDES AN APPROPRIATE VEHICLE TO RESOLVE THAT QUESTION

The reason that respondents labor so hard to create procedural obstacles to review becomes apparent upon reading respondents' treatment of the merits: what respondents offer in opposition to review serves only to confirm that this petition should be granted.

The question presented here is what set of circumstances—if any—permit an employee to proceed directly in federal court with a claim of breach of a collective bargaining agreement, when the employee has not even requested his collective bargaining representative to invoke the grievance-arbitration procedure established by the agreement, and favored by the national labor policy, as the exclusive method for resolving claims arising under the agreement.

The courts below held that although the respondent employees never made the simple request that a grievance be filed, that failure should be excused because a jury found that it would have been "futile" for respondents to have made such a request. That finding was predicated on the jury's hypothesizing, from disputed facts as to matters at several removes, what petitioner UFCW would have done —and why it would have done so—had respondents sought to initiate a grievance. *See* Petition at 11-12.

It is our submission on the merits that such speculation is insufficient to overcome the national labor policy favoring resort to contractual grievance-arbitration processes. *See* Petition at 18-21. And it is our further submission that the question we present is of great importance in the labor law and in allocating the resolution of collective

bargaining disputes between private arbitration and the federal courts, is an open one in this Court, and has caused confusion and conflict in the courts of appeals.

A.

Respondents declare that "this Court's decisions have [already] supplied" the answer to the question presented here. Brief in Opposition at 15. That is not so. This Court has *not* decided any case in which an employee seeking judicial determination of a claim of a breach of a collective bargaining agreement had *never* even asked the union to file a grievance relating to the conduct of which he complains. *See* Petition at 14-15.

Respondents also assert that the differences in how the various circuits have approached the question of "futility" are "minor." Brief in Opposition at 14-15. But the circuit law is in disarray: at least one court of appeals appears to proceed on the premise that an employee's complete failure to request the union to proceed with his grievance necessarily is fatal to a federal court breach of contract suit, *see Carr v. Pacific Maritime Ass'n*, 904 F.2d 1313, 1317-18 (9th Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991); other courts allow such a suit to proceed if there is "a clear and positive showing of futility," *Terwilliger v. Greyhound Lines, Inc.*, 882 F.2d 1033, 1039 (6th Cir. 1989); and other courts—most notably, the court below—require much less. *See* Petition at 15-17.

Respondents declare that the decisions of this Court and of the various circuits all stand for the uniform proposition that "determining when exhaustion of contractual remedies is futile is a factually intensive undertaking." Brief in Opposition at 15. With all respect, respondents' declaration that this is the only "truth told by the various cases" in point, *id.*, is an admission against interest. The fact that the lower court cases on this threshold jurisdictional issue have not generated any meaningful legal standard, and that, as a result, juries are left at large to decide in each case whether the national labor policy fav-

oring resort to contractual grievance-arbitration processes will be honored, or whether, instead, an employee who never requested that a grievance be filed will be permitted to take his contract claim to federal court, demonstrates the need for this Court's review.

B.

Respondents' shifting explanations as to why it would have been futile in this case to have requested that a grievance be filed only serve to underscore that the decision below cannot be reconciled in any principled way with the national labor policy and with the decisions of other circuits.

1. Respondents make much of the contention that the International Union's attorneys, even though they had not been asked by respondents to file a grievance, considered and rejected the option of having the International initiate a grievance on its own. Brief in Opposition at 17-19. The court below did not even mention this contention, and it is unavailing.

As we have noted, the *Local* Union—which was held to be an entirely faithful collective bargaining representative for respondents—could have processed a grievance. *See* Petition at 4. Evidence as to whether the *International* Union and its attorneys viewed the filing of such a grievance as fruitful is thus beside the point. In any event, as we show in the margin, the evidence respondents cite does not even indicate that the *International* was disposed against a grievance concerning Morrell's breach of Section 10 of the 1979 Agreement.[3]

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[3] Respondents begin by quoting testimony that did not even concern a possible grievance involving section 10 of the Agreement but concerned a possible grievance involving sections *12 or 13*. *See* P. Supp. App. at 218-219, quoted in part in the Brief in Opposition at 18 and n.42. Those sections prohibited discrimination on the basis of union membership (section 12) and required that preference in hiring be given to former Morrell employees (section 13). P. App. at 234. Those provisions were relevant to the question whether Morrell had committed a contract violation by engaging in discriminatory *hiring* when the Arkansas City plant

Other circuits have refused to excuse employees for having failed to request a grievance in circumstances where the union officials *who would be responsible for processing any grievance* had expressed much clearer hostility to the potential grievance than was expressed here by any representatives of the *International* Union, let alone by any representatives of the *Local* Union. *See* cases cited in the Petition at 16-17 and n.27.

2. After quoting the *only* communication by the International Union concerning the filing by the International of an unfair labor practice charge—a communication that does not suggest in any way that the decision to file a charge would somehow prevent the filing by the Local Union of a section 10 grievance, *see* Petition at 7—respondents assert that "[c]lass members understood Petitioner-union's notice to indicate that the petitioner would enforce the Master Agreement before the NLRB, and that they had to do nothing further to obtain enforcement of this contract." Brief in Opposition at 18 and n.45, citing P. Supp. App. at 214-215. *See also* Brief in Opposition at 7 and n.22 (citing the same testimony).

The UFCW's notice cannot possibly be read to assert that there was no reason for the employees to consider filing a grievance that supplemented the International's unfair labor practice charge. Certainly there is nothing

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was reopened in a new guise. That question is entirely distinct from the section 10 issue of a frauduent *closing* involved in this case.

Respondents go on to quote testimony that UFCW attorneys believed that filing an unfair labor practice charge was a "better position" than filing a grievance. Brief in Opposition at 18, quoting P. Supp. App. at 242-243. *See also* D. App. at 1127 (cited in Brief in Opposition at 7 and n.24) (UFCW believed that filing an unfair labor practice charge was "the best possible way" to attempt to improve wages at the Arkansas City plant.) Such testimony that the International Union, in considering what steps to take on its own, viewed an unfair labor practice charge as the best strategy does not suggest in the least that the International Union somehow would have prevented the Local Union from pursuing a section 10 grievance.

in the notice so much as suggesting that the unfair labor practice charge was equivalent to a grievance raising every possible claim that Morrell had breached the collective bargaining agreement, including particularly the claim for breach of section 10 that respondents eventually asserted in this case.[4]

There is, moreover, no evidence that respondents were misled in any way by the notice concerning the unfair labor practice charge. In the sole snippet of testimony respondents cite on this point, plaintiff Aguinaga merely testified that he took no steps to protect his interests because he had believed "for years that [the International Union] would take care of us."[5] To suggest that an

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[4] As noted, there was testimony that the International Union viewed the unfair labor practice charge as the most effective means of litigating the issue of *discrimination in hiring* in connection with the reopening of the Arkansas City plant, which is distinct from the issues involved in this suit. *See supra* note 3.

[5] *See* P. Supp. App. at 214-215 (cited in Brief in Opposition at 7 n.22, 18 n.45):

Q. What specifically did you do when you found out that the plant was going to reopen?

A. I did nothing.

Q. Why is that?

A. Well, after the plant opened a little while I just kind of sat back and I wanted to see what was going to happen, you know, they closed down, they opened back up which I knew there was provision in the contract that covered the opening and closing of packing houses and I just kind of set back and didn't do anything. Then the International Union filed charges against them and I thought, well, here we go again, the union is going to take care of it, they are going to take care of it.

Q. Why did you think the union would take care of it?

A. Well, this was drilled into us for years that they would take care of us and I had no other reason to believe that, than to believe that the International Union was going to stop this thing from happening.

Q. Because of the violation you thought that had occurred?

A. Yes.

Q. And did you follow the proceedings and the charge?

[Continued]

employee is excused from requesting that a grievance be filed merely because the employee has faith that the union will always take every possible step on its own is to drain the exhaustion requirement of all meaning.

3. Even if the filing and pendency of the unfair labor practice charge constituted a basis for excusing respondents' failure to request that a grievance be filed, that excuse by its own logic ended when the charge was withdrawn.[6] Respondents seek to bury that problem by asserting that "[a]t this point, filing a grievance would have been untimely." Brief in Opposition at 8. But respondents do not explain why, if their section 10 claim was timely when it was asserted in federal court, it would not have been timely had it been asserted in the grievance process instead.

As the D.C. Circuit explained in *Le Boutillier v. Air Line Pilots Ass'n*, 778 F.2d 883 (D.C. Cir. 1985), the contention that a grievance might have been found to be untimely does not provide "even a wisp of feasible argument justifying [the employee's] utter disregard of the contractual [grievance] procedure." *Id.* at 885. "Had [the employees] invoked the [grievance] procedure only to be turned away for filing too late, this would be a different case, one on which we express no opinion. But [the employees] never put [their] 'futility' theory to the test by filing a [grievance]. . . ." *Id. See generally Nolde Bros. Inc. v. Bakery Workers*, 430 U.S 243, 251 (1977) (grievance arising under collective bargaining agreement remains arbitrable after expiration of the agreement).

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[5] [Continued]

A. To a certain extent. It was mostly just talking to people and finding out what was going to happen. I didn't actually pursue it with the union personnel or anybody like that to find out because I was concerned about my new job and I was more concerned about that than anything right at that time because I was working a lot of hours and I felt real fortunate to be working.

[6] Respondents distort the record concerning the UFCW's decision to withdraw the charge. *Compare* Brief in Opposition at 7-8 *with* Petition at 8.

4. After running through all of the foregoing alternative justifications for a finding of "futility," respondents place their greatest emphasis on yet another theory, *viz.*, that in the side letters to the 1982 collective bargaining agreement with Morrell the UFCW "had already agreed to cancel respondents' rights under the old [1979] agreement." Brief in Opposition at 16. *See also id.* at 3-5.

We already have shown that the side letters cannot bear the meaning respondents now would place on them: by their express terms, the side letters dealt only with the question whether the *opening* of a plant, *without more,* would violate the *1982* Master Agreement, and the letters cannot fairly be read to have waived claims that the *closing* of the Rodeo plant, for a *prohibited purpose,* had violated section 10 of the *1979* Master Agreement. *See* Petition at 11 n.25. The UFCW, at least, never interpreted the side letters as having had such a purpose or effect.[7] Any dispute on this score was itself a matter to be resolved through the grievance-arbitration process; not a matter that justifies *bypassing* that process.

C.

The Brief in Opposition's resort to an ever-shifting series of hypotheses, one more strained than the other, in an effort to explain how the jury might have concluded that it would have been "futile" for respondents to have

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[7] Respondents note that in responding to the UFCW's unfair labor practice charge, Morrell declared to the NLRB that the Company interpreted the 1982 side letters as releasing all rights under the 1979 Agreement. Brief in Opposition at 16 n.39, citing D. App. at 629-642. (To the same effect, respondents quote self-serving deposition testimony of Morrell officers whom respondents elsewhere accuse of deceit. Brief in Opposition at 4). Respondents fail to note that the very submission to the NLRB in which Morrell expressed its purported understanding of the side letters shows that UFCW strongly disagreed with Morrell's interpretation and took the position, just as the UFCW has done throughout this litigation, that the side letters did *not* give up respondents' section 10 rights. D. App. at 636-637. Such disputes are grist for the arbitral mill.

requested the filing of a grievance, does *not* mean that the question presented by the *certiorari* petition is itself fact-intensive. Rather, the Brief in Opposition is an unwitting testament to the fact that this case presents in sharp relief the adverse consequences of a rule of law that leaves employees free to bring their contract claims to federal court without ever having made the simple request that a grievance be filed. As this case illustrates, in the absence of clear legal parameters, a jury is left to speculate as to what might or might not have happened had such a request been made, and effectuation of the national labor policy is left to depend on the result of that speculation.

None of the shifting theories respondents advance comes close to explaining why respondents chose to bypass the grievance-arbitration system and to sue in federal court instead—much less to excuse their choice. Of course, the attorneys' fees awarded to respondents' counsel—more than half a million dollars, *see* Petition at 4 n.5—would not have been available in grievance arbitration; and in that forum respondents would have presented their contract claims to an arbitrator rather than to a jury. Such considerations may help to explain the "depressingly large number of recent cases grow[ing] out of refusals to use or abide by the grievance-arbitration machinery of collective-bargaining agreements." *Bailey v. Bicknell Minerals, Inc.*, 819 F.2d 690, 691 (7th Cir. 1987) (Easterbrook, J.). But these are the very considerations that, under the national labor policy, argue in favor of requiring resort to grievance--arbitration procedures rather than to litigation. *See* cases cited in Petition at 19-20.

CONCLUSION

For the foregoing reasons and those stated in the Petition, this Court should grant the petition for certiorari.

Respectfully submitted,

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